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No. ___

IN THE

Supreme Court of the United States

WALTER A. FORBES,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit correctly hold, contrary to five others, that written statements that a government witness has received immunity from prosecution, made to the court by government attorneys during two previous trials, are not "admissions by party-opponent" under Federal Rule of Evidence 801(d)(2)?

2. Under the Fifth and Sixth Amendments and this Court's holdings in *Holmes* v. *South Carolina*, 547 U.S. 319 (2006), and *Giglio* v. *United States*, 405 U.S. 150 (1972), may a federal criminal defendant be precluded from informing the jury of repeated written statements by the government, during two prior trials of the same defendant, that a government witness has received immunity from prosecution?

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v.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case October 1, 2007, as corrected October 3, 2007.

OPINIONS BELOW

The oral opinion of the United States District Court for the District of Connecticut excluding evidence of prosecutors' prior statements, and two of its post-trial opinions, are unreported; they are reproduced in the Appendix at A. 11a, 14a and 16a.[1] The summary order of the United States Court of

[1] "A." refers to the appendix to this petition, "C.A.A." to the appendix filed in the Court of Appeals.

Appeals for the Second Circuit is unreported and is reproduced at A. 1a. The order of that Court denying rehearing and rehearing *en banc* is unreported and is reproduced at A. 8a.

JURISDICTION

The judgment of the Court of Appeals was entered October 1, 2007. A timely petition for rehearing and rehearing *en banc* was denied December 4, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Federal Rule of Evidence 801(d) provides in relevant part:

> "A statement is not hearsay if --
>
> * * *
>
> "(2) Admission by party-opponent. The statement is offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . ."

The complete texts of Fed. R. Evid. 801 and the Fifth and Sixth Amendments to the Constitution of the United States are reproduced in the appendix at A. 18a.

STATEMENT

Petitioner was tried three times, in 2004, 2005 and 2006. Two juries were unable to reach a verdict, and accordingly two mistrials were declared. The government then brought petitioner to trial for a third time, before a new judge. This time the jury acquitted on one of four counts,[2] but convicted on three.[3] Petitioner was sentenced to twelve years and seven months in prison, and to pay $3.275 billion as restitution.

The central issue in the case, both the government and petitioner agreed, was whether petitioner had known of fraudulent accounting practices in the marketing company he had founded. At each of the three trials, in the government's words, the "question in dispute is this, simply put, whether the defendant knew about the fraud." C.A.A. 10926. There was no documentary evidence to support the government's contention. However, Kevin Kearney, a former employee and cooperating government witness, gave testimony that supported the government's contention that petitioner had had such knowledge.[4]

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[2] Title 15 U.S.C. §§ 78j(b) and 78ff(a) (securities fraud).

[3] Title 18 U.S.C. § 371 (conspiracy) and 15 U.S.C. § 78ff(a) (false statement in a report to the SEC), and 18 U.S.C. § 2 (aiding or abetting).

[4] To support its allegation that petitioner had knowledge, the government relied on testimony of only one person who claimed to have first-hand confirmation, alleged co-conspirator Cosmo Corigliano, the company's former chief financial officer, who was subject to extensive and damaging impeachment in which he acknowledged having lied on multiple occasions. *E.g.*, C.A.A. 7566-68, 9362-67, 9375-9404, 9417, 9426-27, 10985-93. Ultimately the government acknowledged to the jury that "It is true that Mr. Corigliano is a criminal," C.A.A. 11105, but urged

A. The Government's Acknowledgments of Immunity During Two Trials.

In the first two trials of petitioner, the government had presented Kearney as a witness who had received immunity in return for cooperation. In those trials Kearney acknowledged that beginning in 1998 for the next six years he met with prosecutors "about 15 or 20 times." C.A.A. 5592-93. The government acknowledged that he had received informal immunity from prosecution.[5] The government confirmed that again and again over the course of two years, in what the government itself later described as "a slew of Government briefs and pleadings" C.A.A. 2144, that it filed with the previous district judge. There were no fewer than five such written government submissions to the first district judge:

> (1) In the first trial, the government filed a statement that it "joins in Forbes' request" for an instruction that Kearney had been "promised by the government that, in exchange for [his] testimony, [he] will not be prosecuted." C.A.A. 2128, 2131. Accordingly, at the first trial the following jury instruction was given, C.A.A. 4926-27:
>
> "You have heard the testimony of witnesses Kevin Kearney and Steven Speaks who have

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jurors to ignore "whether he lied before he signed the plea agreement," C.A.A. 11137. Kearney, who did not himself have any personal contact with petitioner, was the only alleged co-conspirator to bolster Corigliano's claim that petitioner knew about the fraud.

[5] "Informal" immunity is described by the Department of Justice as its preferred method of agreement for obtaining cooperation. See U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.630 (2002).

> been promised by the government that in exchange for their testimony they will not be prosecuted for any crimes they may have admitted here in court or in interviews with the government . . . [T]he testimony of a witness who has been promised that he will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness . . . Such a witness . . . has a motive to falsify his testimony."

(2) Early in the second trial, the government itself proposed that the same instruction be used again. C.A.A. 395-96.

(3) Later in the second trial, the government confirmed its request. C.A.A. 2135.

(4) Still later in the second trial, the government stated in writing that it had no objection to adding to the instruction the further elaboration that "This promise was not a formal order of immunity by the Court, but was arranged directly between the witness and the government." C.A.A. 2137. The government observed that this was "substantially similar to the Government's Preliminary Request to Charge" and "the Government has no objection to either version being given." C.A.A. 2139. As in the first trial, the court, this time with the addition, gave the instruction. C.A.A. 5879.

(5) Near the end of the second trial, responding in writing to a motion by petitioner to strike part of the government's closing argument concerning Kearney, the government specifically reiterated to the court that Kearney "*is testifying pursuant to an informal immunity agreement.*"

> C.A.A. 761 (emphasis supplied). It argued that because the court had instructed the jury on his immunity, "no further curative instruction is necessary." *Id.* The government added that, unlike a cooperating witness who pleaded guilty and still awaited a future sentence, Kearney was "*a witness who has already received the benefit of an informal immunity agreement.*" *Id.* (emphasis supplied).

The previous district judge, before giving the instruction, even insisted on confirming with government counsel in open court, "Just so we're clear, it's informal immunity of government witness and it's only about Kevin Kearney." C.A.A. 5856. In the first two trials, neither jury convicted.

B. The Government's Recantation and Disclaimer of Immunity in the Third Trial.

At the third trial, however, which was transferred to a new judge, the government's position changed. This time, the government denied that there ever had been an immunity promise to Kearney. It told the court that its repeated contrary statements to the prior judge during the previous two trials, spanning two years, had been simply "inadvertent." C.A.A. 1787. When asked by the court to explain what exactly it meant by "inadvertence," the government responded, "[i]n not objecting earlier." C.A.A. 7014. The government announced that it had assumed "that there was an immunity agreement on behalf of Mr. Kearney; but when we got down and looked really hard at it, it turned out that there is not." C.A.A. 7016. "We were wrong to have conceded this point." C.A.A. 11438. At the third trial the government elicited from Kearney a denial that he had

received a promise that he would not be prosecuted. C.A.A. 8355-56.

Petitioner sought to place in evidence at the third trial, pursuant to Fed. R. Evid. 801(d)(2), the government's statements from the prior two trials that had acknowledged that Kearney had received an informal grant of immunity from prosecution. Petitioner argued that these were substantive evidence "as an admission of the government." C.A.A. 10428.

The government opposed, arguing that in the Second Circuit

> "a prior statement or written submission by a prosecutor can be admitted into evidence in order to demonstrate that the government has taken inconsistent positions on a particular factual dispute only if the defendant can establish that the claim of inconsistency 'is a fair [inference] and that an innocent explanation for the inconsistency does not exist.'"

C.A.A. 2149, quoting *United States* v. *McKeon*, 738 F.2d 26, 33 (2d Cir. 1984), and *United States* v. *Salerno*, 937 F.2d 797, 811 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992). *McKeon* had held that Rule 801(d)(2) should not apply to prior inconsistent statements to the jury by a party's attorney as to which it offered "an innocent explanation," 738 F.2d at 33, and *Salerno* applied that exception to the Rule to prior statements by the government. In the present case, the government argued that "the Government has provided an explanation for its change in positions—its inadvertent failure, during the first two trials, to notice that the Kearney instruction was erroneous as a matter of fact." C.A.A. 2150. Nothing

more was required, the government contended, to exclude its prior statements of fact.

> "Accordingly, this Court should exclude any evidence regarding the Government's change of position, since it is 'innocently explained' . . . ."

Id.

Petitioner remonstrated that the government's "inadvertence" explanation "goes to weight, not admissibility," C.A.A. 10430, and that "[t]here is plenty of evidence that there is not an oversight or it's not a matter of inadvertence, but that he received an oral informal grant of cooperation in return for no prosecution," C.A.A. 7013; see also C.A.A. 7017. As further support petitioner provided the court with correspondence by Kearney's own attorney with the SEC that referred to "The U.S. Attorney's Office['s] . . . agreement with Kearney," C.A.A. 1749; observed that "Kearney's cooperation with the Government's investigation . . . has been rewarded by the U.S. Attorney's office in its decision not to prosecute," C.A.A. 1748; and stated that Kearney "began his cooperation with the U.S. Attorney's Office in August 1998," at which time "that Office made the decision that Kearney's role in a criminal prosecution would be as a witness," after which time he rendered "valuable cooperation," "important cooperation." C.A.A. 1747-49.[6]

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[6] The government responded that Kearney's counsel's "use of the word 'agreement' . . . was an 'unfortunate' word choice." C.A.A. Supp. 16. The government later asserted that Kearney's counsel several years later had denied to the government that Kearney had received immunity. C.A.A. 2148.

C. The District Court's Exclusion of the Government's Prior Statements.

The District Court, however, excluded all the government's prior statements. Even though petitioner also requested that "[a]t a minimum, the Court should conduct an evidentiary hearing on the subject of the statements and promises made to Mr. Kearney by the government between 1998 and 2004," C.A.A. 1730, 7067-68, the District Court made its ruling with no hearing, and not even any affidavits or declarations from the government to support the new representations. The court held:

> "Statements and briefs filed by the government during the previous two trials which make reference to the fact that Kevin Kearney was testifying pursuant to an immunity agreement are not admissible as government admissions as the Court has determined that an innocent explanation exists for the statements. See *United States against McKeon* 738 F.2d, 26 at page 33, 2d Cir. 1984."

A. 11a. The court explained that "there is no more innocent explanation than admitting a mistake . . . ." A. 13a.[7] On that basis it not only refused to give the instruction regarding Kearney's credibility that the previous judge had given in the first two trials, but further ordered that petitioner "shall not be allowed to draw any inferences regarding the existence of an

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[7] "[B]ecause there was an innocent explanation for the supposed inconsistency that Forbes sought to take advantage of, the court did not abuse its discretion in ruling that the government submissions were not admissible under Rule 801(D)(2) . . . ."

A. 14a-15a.

immunity agreement." *Id.* Thus excluded were not just "inferences," but the government's flat statement in writing that Kearney "is testifying pursuant to an informal immunity agreement." C.A.A. 761; p. 6, *supra*. As the District Court later elaborated:

> "The government's written submission at the first trial in which it mistakenly agreed with the defendant's proposed jury instruction that a cooperating witness had benefited from an informal immunity agreement was not an admission under Rule 801(d)(2). The witness did not, as a matter of undisputed fact,[8] receive any form of immunity, and thus there was an innocent explanation for the supposed inconsistency and the defendant was correctly precluded from improperly taking advantage of the government's innocent mistake. See *United States* v. *McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (noting that before a prior statement may be admitted under Rule 801(d)(2) the court must, *inter alia*, determine by a preponderance of the evidence that the inferences sought to be drawn from the inconsistency are fair and that innocent explanations do not exist)."

A. 16a-17a.

Armed with those rulings, and with the jury not aware of immunity received by Kearney, at the third trial the government presented Kearney as an essentially unbiased person performing a civic duty

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[8] The "undisputed fact" was hotly disputed by the defense, based on numerous prior contrary statements by the government which the court excluded, as well as the correspondence of Kearney's own lawyer. See C.A.A. 395-96, 761, 1747-49, 2128, 2131, 2135-39, 4926-27, 5856, 5879; p. 8, *supra*.

in response to compulsory process. C.A.A. 8356. In its closing, the government repeatedly cited Kearney's testimony to the jury:

> "you heard Kevin Kearney testify . . . Kevin Kearney told you . . . . What else did Kevin Kearney tell you . . . . Did Kevin Kearney make up that . . . . Now remember . . . Kevin Kearney told you . . . ."

C.A.A. 10927, 10928, 10933. This time, after two previous juries had failed to do so, the jury convicted.

D. The Court of Appeals' Affirmance.

On appeal, petitioner argued that the exclusion of the government's prior statements violated Rule 801(d)(2) and the Fifth and Sixth Amendments. The government responded that the Second Circuit's *McKeon* decision controlled, and that the District Court had properly excluded and forbidden any reference to "mistaken statements by Government lawyers." Government's Brief, Ct. Apps., at 67. The Court of Appeals for the Second Circuit (Cabranes, Cir. J., Miner, Sr. Cir. J., and Crotty, U.S.D.J.) treated the issue as controlled by settled Second Circuit law, and affirmed. In a brief summary order, A. 1a, the Court of Appeals held that by claiming "mistake," "the Government offered a sufficient explanation":

> "Forbes argues that the District Court erroneously blocked his attempts to introduce two prior inconsistent prosecutorial statements—(i) that one of its witnesses had received informal immunity . . .—in violation of FRE 801(d)(2) and the Due Process Clause. Forbes also asserts that the District Court erred in refusing to provide an

> informal immunity instruction given to the jury at the two prior trials but which the Government had since learned was mistaken. Because the Government offered a sufficient explanation for the mistaken jury instruction with regard to one witness' informal immunity . . . the District Court did not abuse its discretion."

A. 5a-6a.

Petitioner sought rehearing and rehearing *en banc*, urging that the exclusion violated Rule 801(d)(2) and the Fifth and Sixth Amendments, and was in conflict with decisions of other circuits and of this Court. Rehearing was denied without opinion. A. 8a.

REASONS FOR GRANTING THE WRIT

This petition sharply presents the often-noted, but never resolved, question whether Federal Rule of Evidence 801(d)(2)—which without limitation excludes admissions of a party-opponent from the definition of inadmissible hearsay—nevertheless does not apply (or in some circuits applies only with limitations), to statements made in court by the government's attorneys in criminal prosecutions. It is an issue as to which one state court observed last year the federal circuits are "significantly fractured." *State* v. *Pearce*, ___ P.3d ___ (Ida. App. 2007). All circuits, insofar as can be determined, unhesitatingly apply the Rule to admit in evidence prior statements of the government in civil cases.[9] With respect to criminal cases, however, the circuits are split three ways as to the meaning of the identical language of the same Rule of Evidence. The issue is raised especially acutely in this case, in which the prior

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[9] See pp. 26-27, *infra*.

statements by the government were made repeatedly *to the court* in prior trials of the *same defendant* relating to the *same witness*—and when the statements concern matters of fact, not argument, and when the government's latest factual position flatly contradicts its earlier ones.

1. In criminal trials, on the precise and focused issue of applying Rule 801(d)(2) to statements to the court by government attorneys—the case presented here—the circuits have chosen among three positions. The First and D.C. Circuits hold such statements admissible always; the Fifth and Seventh, never; and the Fourth and Eleventh, along with the Second Circuit here, exclude them unless a series of judicially-created extra-Rule criteria of the Second Circuit's invention—such as absence of a loosely-conceived "innocent explanation"—are satisfied. Several state supreme courts that construe an identical rule of evidence are similarly divided three ways.

2. On the more comprehensive issue of whether Rule 801(d)(2) can be invoked in criminal cases for statements by government agents generally, not just government attorneys, the three-way split engages ten circuits and is even more profound. At this level, five circuits reject the holding of the Second Circuit here, and hold instead that Rule 801(d)(2) applies as it is written, without any judge-created exclusion. Three, the Seventh and Fifth, and the Second as well for agents other than attorneys, adhere to their pre-Federal-Rules view that in criminal trials such statements of government agents are not admissible. Two others add restrictions on admissibility that are nowhere to be found in the text or history of the Rule.

3. If Rule 801(d)(2) does not apply, then this petition further presents the question whether, under

the Fifth and Sixth Amendments, a federal criminal defendant may be precluded from informing the jury of previous statements by the government that it granted informal immunity from prosecution to a government witness. The Second Circuit here has rejected a defendant's right to offer in his defense credible evidence that a government witness has received immunity. That position is contrary not only to decisions of at least three other circuits but also to holdings of this Court in cases that stretch from *Giglio* v. *United States*, 405 U.S. 150 (1972), to *Holmes* v. *South Carolina*, 547 U.S. 319 (2006), that a defendant may not be precluded from informing the jury of critical evidence with indicia of reliability bearing directly on credibility of a prosecution witness.

Here the government in two prior trials of the same defendant stated to the court, not just once but several times, that a key government witness had received immunity from prosecution. Yet when at the beginning of the third trial the government suddenly disclaimed and denied what for two years it had previously acknowledged, the District Court, applying the Second Circuit's non-textual construction of Rule 801(d)(2), excluded the government's prior factual statements to the court and refused to allow the government's statements to be made known to the jury. The court saw no need even for an evidentiary hearing to determine the basis for the government's "innocent explanation" for two years of chronic "mistakes" and "inadverten[ce]."

Two previous juries, made aware of Kearney's immunity, had not found the evidence sufficient to convict. In the third trial—with all evidence of the government's statements acknowledging a grant of

immunity excluded, and with any reference to them prohibited—the third jury reached a different verdict.

I. THE SECOND CIRCUIT'S CONSTRUCTION OF FEDERAL RULE OF EVIDENCE 801(d)(2) IS CONTRARY TO DECISIONS OF THIS COURT AND OF FIVE OTHER CIRCUITS.

A. The Circuits Are Deeply Divided as to Whether Rule 801(d)(2), Which Provides That Statements of a Party-Opponent Are Not Hearsay, Does Not Apply in Criminal Trials to Statements of Government Attorneys and Agents.

1. *The First, Sixth, Eighth, Ninth and District of Columbia Circuits Hold That Rule 801(d)(2) Applies Without Qualification to Statements by the Government.*

The Second Circuit's construction of Rule 801(d)(2) has been rejected by the courts of appeals of five circuits, which hold that Fed. R. Evid. 801(d)(2) makes statements of government agents, including in-court statements of fact by attorneys, an exception to the hearsay rule in criminal prosecutions no less than in any other.

The First Circuit in the leading case *United States* v. *Kattar*, 840 F.2d 118 (1st Cir. 1988), applied Rule 801(d)(2) to statements by government attorneys in a brief and a sentencing memorandum. The First Circuit explicitly agreed with an earlier D.C. Circuit holding that

> "the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases."

840 F.2d at 130, quoting *United States* v. *Morgan*, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978). Explicitly rejecting contrary Seventh Circuit decisions, the First Circuit held that "Whether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases . . . the Justice Department certainly should be considered such." *Kattar*, 840 F.2d 130. The First Circuit further reasoned:

> "We agree with Justice (then Judge) Stevens that the assertions made by the government in a formal prosecution (and, by analogy, a formal civil defense) 'established the position of the United States and not merely the views of its agents who participate therein.' . . . *The government cannot indicate to one federal court that certain statements are trustworthy and accurate, and then argue to a jury in another federal court that those same assertions are hearsay.*"

Kattar, 840 F.2d at 131 (emphasis supplied), quoting *United States* v. *Powers*, 467 F.2d 1089, 1097 n.1 (7th Cir. 1972) (Stevens, J., dissenting), *cert. denied*, 410 U.S. 983 (1973).

The D.C. Circuit in *Morgan*, as the First Circuit noted, had emphatically stated that

> "Notwithstanding the plain language of the Rule, the government urges us to hold it inapplicable to the prosecution in criminal cases . . . . [T]here is nothing in the history of the Rules generally or in Rule 801(d)(2)(B) particularly to suggest that

> it does not apply to the prosecution in criminal cases."

581 F.2d at 937-38. In *United States* v. *Warren*, 42 F.3d 647, 655 (D.C. Cir. 1994), the D.C. Circuit reiterated its holding in *Morgan* and the First Circuit's in *Kattar*, applying the Rule to a statement of facts attached by the government to a criminal complaint.

The Ninth Circuit has applied the Rule broadly to hold admissible statements of government attorneys and agents. See *United States* v. *Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989) (government manual); *Hoptowit* v. *Ray*, 682 F.2d 1237, 1262 (9th Cir. 1982) (investigative report of attorney general's office admissible under Rule 801(d)(2)). More recently the Ninth Circuit's construction was thoroughly explained by one of its district courts in *United States* v. *Bakshinian*, 65 F. Supp. 2d 1104, 1108 (C.D. Cal. 1999) ("*McKeon*'s reasoning breaks down when applied to a government prosecutor").

The Sixth Circuit also agrees with the established First Circuit and District of Columbia Circuit construction of Rule 801(d)(2). See *United States* v. *Branham*, 97 F.3d 835, 851 (6th Cir. 1996) (citing *Morgan* with approval); *United States* v. *Reed*, 167 F.3d 984, 989 (6th Cir. 1999). The Eighth Circuit at least in dictum has recognized that statements of a government official may be admissible under Rule 801(d)(2) (though not for the truth of hearsay they report). *United States* v. *Santisteban*, 501 F.3d 873, 879 (8th Cir. 2007).

2. *The Seventh and Fifth Circuits Hold That in Criminal Cases Rule 801(d)(2) Does Not Apply to Government Statements.*

At the other end of the spectrum, the Seventh Circuit wholly denies the applicability of Rule 801(d)(2) in criminal cases to prior statements by the government. In *Powers*, noted *supra*, which was decided before adoption of the Federal Rules of Evidence, the Seventh Circuit held that a criminal defendant was not entitled to introduce transcripts from a previous trial to show that the government had previously taken the position that a different person had committed the offense. However, then Judge Stevens in dissent had concluded:

> "I believe . . . that a more basic issue is raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens.
>
> "The inconsistency may be justified or explained by newly discovered evidence or by more accurate analysis of facts which were always available. But in my opinion *the fact of the inconsistency may properly be brought to the attention of the jury and the government put to the burden of explaining . . . .*"

Id. at 1097 (footnote omitted; emphasis supplied). That dissenting opinion, although not accepted in the Seventh Circuit, subsequently has been cited, quoted with approval, and adopted by the First and District of Columbia Circuits and by other courts as well.[10]

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[10] See *Harris* v. *United States*, 834 A.2d 106, 118, 120 (D.C. 2003) ("We agreed with the views of the First Circuit, the D.C.

Adhering to its 1972 *Powers* decision, which antedated Rule 801(d)(2), the Seventh Circuit continues to hold that in spite of the Rule, statements by government attorneys cannot be introduced against the government in a criminal proceeding, "[b]ased on the common law principle that no individual should be able to bind the sovereign." *United States* v. *Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir.), *cert. denied sub nom. United States* v. *Marcello*, 522 U.S. 988 (1997). *Accord, e.g.*, *United States* v. *Arroyo*, 406 F.3d 881, 888 (7th Cir. 2005) ("This court has held that government agents are not party-opponents for purposes of Rule 801(d)(2)."); *United States* v. *Prevatte*, 16 F.3d 767, 779 n.9 (7th Cir. 1994) (same) ("We see no reason to disturb this longstanding rule;" noting conflict with D.C. Circuit in *Morgan* and First Circuit in *Kattar*); *United States* v. *Kampiles*, 609 F.2d 1233, 1246 n.16 (7th Cir. 1979) (noting conflict), *cert. denied*, 446 U.S. 954 (1980).

The Fifth Circuit specifically adopted the Seventh Circuit's construction of the Rule in *United States* v. *Garza*, 448 F.3d 294, 298 (5th Cir. 2006). See also *Lippay* v. *Christos*, 996 F.2d 1490, 1497-98 (3d Cir. 1993) (dictum) (citing Seventh and Second Circuit cases with apparent approval).

Circuit, and then-Judge (now Justice) Stevens that the United States is 'bound by the position taken in a formal prosecution . . . .'") ("We reaffirm and adhere to our holding . . . that the prior statements of an Assistant United States Attorney can be treated as party admissions."); *Freeland* v. *United States*, 631 A.2d 1186, 1192 (D.C. 1993) (quoting *Powers* dissent). See also *Jacobs* v. *Scott*, 513 U.S. 1067, 1070 (1995) (Stevens, J., joined by Ginsburg, J., dissenting from denial of certiorari) (quoting *Powers* dissent).

3. *The Second, Fourth and Eleventh Circuits Hold That in Spite of Rule 801(d)(2), in Criminal Cases Admissibility of Government Statements Is Severely Restricted.*

In affirming exclusion from a criminal case of government attorneys' prior statements to the court, the Second Circuit approved application of a doctrine limiting Federal Rule of Evidence 801(d)(2) that it announced in *United States* v. *McKeon*, 738 F.2d 26 (2d Cir. 1984), and has invoked on multiple occasions in the two decades following.[11] According to *McKeon* (which concerned statements to the jury by a defendant's attorney), such statements by a party's attorney may be introduced in evidence provided every one of three conditions is met: (1) the prior statements must be statements of fact; (2) their inconsistency with the party's present position must be clear; and (3) the inference for which they are offered must be "a fair one and . . . an innocent explanation for the inconsistency does not exist." 738 F.2d at 33; see also *United States* v. *Salerno*, 937 F.2d 797, 811 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992). One court has described the Second Circuit's *McKeon* doctrine as "a rather elaborate

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[11] *E.g.*, *United States* v. *Ford*, 435 F.3d 204, 215 (2d Cir. 2006). *McKeon* was also followed in *United States* v. *GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991), which the District Court in the present case explained as permitting prior statements of government counsel to be admitted if the government's change was "wholly without explanation." P. 12a, *infra*. In criminal cases concerning extrajudicial statements by government agents, the Second Circuit has followed its pre-Federal-Rules exclusionary rule. See *United States* v. *Yildiz*, 355 F.3d 80, 80-81 (2d Cir. 2004) (noting split among circuits), *reaffirming United States* v. *Santos*, 372 F.2d 177, 180-81 (2d Cir. 1967).

series of rules to test admission of the evidence." *People* v. *Cruz*, 643 N.E.2d 636, 665 (Ill. 1994). The Second Circuit here held, affirming the District Court's application of *McKeon*, that because the government now represented that it had been "mistaken" in its prior repeated statements to the court throughout two trials, therefore "an innocent explanation" had been sufficiently demonstrated—and that ended the matter.

Two federal circuits have followed the Second Circuit's *McKeon* gloss on Rule 801(d)(2). In *United States* v. *DeLoach*, 34 F.3d 1001, 1005-06 (11th Cir. 1994), the Eleventh Circuit explicitly adopted *McKeon*, holding that prior statements by a prosecutor were properly excluded in a criminal case in spite of Rule 801(d)(2). The Fourth Circuit has held the same. *United States* v. *Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) (adopting *McKeon*, holding prior statements of government attorneys inadmissible).[12]

B. The Second Circuit's Departure From the Plain Language of Rule 801(d)(2) Is Contrary to Decisions of This Court.

1. *This Court Repeatedly Has Held That the Federal Rules of Evidence Are To Be Construed According to Their Plain Language.*

This Court often has held that the Federal Rules of Evidence are to be construed according to their plain language. Indeed, it has applied that principle to Rule 801 itself. See *United States* v. *Owens*, 484 U.S.

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[12] *But cf. United States* v. *Barile*, 286 F.3d 749, 758 (4th Cir. 2002) (dictum that Rule 801(d)(2) would apply to statements by government official).

554, 561 (1988) (adopting "the more natural reading" of Fed. R. Evid. 801(d)(1)(C)); see also *United States* v. *Zolin*, 491 U.S. 554, 566 (1989) (rejecting construction "inconsistent with the . . . plain language" of Fed. R. Evid. 104(a)); *Huddleston* v. *United States*, 485 U.S. 681, 687 (1988) (declining to read unstated limitations into Rule; "[w]e reject petitioner's position, for it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(d)"); *Bourjaily* v. *United States*, 483 U.S. 171, 178 (1987) ("It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104") (emphasis in original).

Rule 801(d)(2) does not contain in its text, nor does its structure call for, the exception that the Second Circuit has created. Nor does the text support the even broader exclusion applied in the Fifth and Seventh Circuits. "Nothing on the face or in the history of Fed. R. Evid. 801(d)(2) suggests the admissions doctrine does not reach statements by government agents." 4 C. MUELLER & L. KIRKPATRICK, FEDERAL EVIDENCE 458-59 (3d ed. 2007). "[I]t is very hard to find any support in [Rule 801(d)(2)'s] language or structure for a blanket exclusion of statements by government agents." 2 K. BROUN, MCCORMICK ON EVIDENCE 205-06 (6th ed. 2006). "[T]here is nothing in the plain language of Rule 801(d) to suggest that it does not apply to the prosecution in a criminal case . . . ." *State* v. *Villeda*, 599 S.E.2d 62, 66 (N.C. App. 2004) (state rule identical to federal rule). See also *United States* v. *American Tel. & Tel. Co.*, 498 F. Supp. 353, 358 (D.D.C. 1980) ("[t]he unambiguous language of Rule 801(d)(2)"). Three years after the Federal Rules of Evidence were enacted in 1975, the District of Columbia Circuit pointed out that "the Federal Rules

clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases." *Morgan*, 581 F.2d at 937 n.10.

When the Federal Rules of Evidence were being considered, it was explained to Congress that Rule 801(d)(2) was intended in various respects to alter the common law.[13] The Advisory Committee Note accompanying the Federal Rules anticipated as to Rule 801(d)(2) that there would be "generous treatment of this avenue of admissibility." Committee on Rules of Practice and Procedure, *Revised Draft of Proposed Rules of Evidence*, 51 F.R.D. 315, 417 (1971). Congressional consideration reflected nothing to the contrary.

In construing the Federal Rules, this Court has not readily implied unstated conditions or exceptions. For example, in examining Fed. R. Evid. 804 this Court explained that "Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not . . . . [W]e must enforce the words that it enacted." *United States* v. *Salerno*, 505 U.S. 317, 322 (1992).

> "This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases."

Id. "We . . . fail to see how we may create an exception to Rule 804(b)(1)." *Id.* at 324. *Cf.* also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 586-87 (1993) (holding that Federal Rule of

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[13] *E.g.*, statement of Assistant Attorney General Rakestraw that Rule 801(d)(2)(D) "is straightforward in overturning the traditional rule" requiring proof an of agent's authority to make statement. Hearings on Federal Rules of Evidence Before Senate Committee on Judiciary, 93d Cong., 2d Sess. 161 (1973).

Evidence 702 superseded the common-law test for expert testimony).

The Second Circuit and the Seventh Circuit, and those circuits aligned with one or the other of them, have scarcely mentioned the Rule itself, much less its text, in their decisions. Instead, they have treated admissibility of statements by government attorneys and agents as if this were simply an issue of common law. But this Court several times has recognized that the Federal Rules of Evidence modified common-law rules in many respects. *E.g., Bourjaily* v. *United States*, 483 U.S. at 177.

2. *To Exempt the Government From Rule 801(d)(2) Is Contrary to Text, History and the Fifth Amendment.*

This Court recognized more than a century ago that "[i]n the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon . . . . Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." *Oscanyon* v. *Arms Co.*, 103 U.S. 261, 263 (1880). And certainly in a federal criminal prosecution, it is the government that is the defendant's party-opponent. Indeed, "[t]he party admission rule is 'particularly' applicable to statements by government attorneys, who have the power to bind the government." *Harris* v. *United States*, 834 A.2d 106, 119 (D.C. 2003), quoting WEINSTEIN'S FEDERAL EVIDENCE § 801.33[3] (2d ed. 1997), and citing 2 MCCORMICK ON EVIDENCE § 257 at 142 n.8 (5th ed. 1999) and *Giglio* v. *United States*, 405 U.S. 150, 154 (1972).

Even more troubling, the Seventh Circuit, although it excludes prior statements of government agents, without hesitation has applied Rule 801(d)(2) to allow in evidence prior statements of *defense* counsel, to be used against the criminal defendant. *United States* v. *Brandon*, 50 F.3d 464, 468-69 (7th Cir. 1995) (defense counsel's response to grand jury subpoena); *United States* v. *Harris*, 914 F.2d 927, 931-32 (7th Cir. 1990) (prior defense counsel's statements at trial). See also *State* v. *Worthen*, 765 P.2d 839, 848 (Utah 1988) ("Clearly, that rationale [excluding admissions of government agents in criminal cases] finds no basis in fact when the government agents are involved in law enforcement work. The rationale is even more lacking in the case of statements made by the prosecutor in a criminal case.").

"Rule 801(d)(2), the modern rule defining party admissions, was written broadly and contains no special rule for the government, either explicit or implicit." Poulin, *Party Admissions in Criminal Cases*, 87 MINN. L. REV. 401, 479 (2002). For a Federal Rule of Evidence to command unequal treatment of the parties in a criminal proceeding would call into question its validity under the Fifth and Sixth Amendments. Thus in *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989), this Court declined to construe Fed. R. Evid. 609(a) as treating civil plaintiffs and defendants differently, concluding that "the plain text does not resolve these issues," 490 U.S. at 511, and that a literal reading "produces an absurd, and perhaps unconstitutional, result," *id.* at 527 (Scalia, J., concurring).

C. The Second Circuit's Construction of Rule 801(d)(2) for Criminal Cases Is Contrary to the Construction of the Same Rule in Civil Cases.

Ironically, many of the same circuits that hold statements by government attorneys not within Rule 801(d)(2) in criminal cases have no difficulty holding that the same language, of the same Rule, applies to such statements in civil cases in which the government is a party. See *United States* v. *D.K.G. Appaloosas, Inc.*, 630 F. Supp. 1540, 1564 (E.D. Tex. 1986) ("Government attorneys in criminal cases are exempt from this rule [801(d)(2)(D)] . . . . In civil cases, however, . . . statements by government attorneys are admissible."), *aff'd*, 829 F.2d 532 (5th Cir. 1987), *cert. denied sub nom. One 1984 Lincoln Mark VII Two-Door* v. *United States*, 485 U.S. 976 (1988); *Murrey* v. *United States*, 73 F.3d 1448, 1456 (7th Cir. 1996) (reversing because of exclusion of statements of government officials that should have been admitted under Rule 801(d)(2)).[14]

There is no logical or textual basis to construe the words of Rule 801(d)(2) as applying to government statements in civil cases but not criminal. As this Court pointed out in *Green* v. *Bock Laundry Machine Co.*, 490 U.S. at 526, Rule 1101(b) of the Federal Rules of Evidence specifically provides that "These

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[14] The Rule is applied routinely by other circuits to such statements in civil cases. See generally, *e.g.*, *Wright-Simmons* v. *City of Oklahoma City*, 155 F.3d 1264, 1268 (10th Cir. 1998) (written notes of city official); *Skaw* v. *United States*, 740 F.2d 932, 937 (Fed. Cir. 1984) (statements of government agents); *Czekalski* v. *Peters*, 475 F.3d 360, 366 n.2 (D.C. Cir. 2007) (statements reported by federal investigators "admissible as admissions by a party opponent under Rule 801(d)(2)").

rules apply generally to civil actions and proceedings . . . [and] to criminal cases and proceedings . . . ." Even at common law, "In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act . . . . Nor is there any authority for confining the rule to civil cases." *United States* v. *Gooding*, 12 Wheat. 460, 469 (1827) (Story, J.). "Nothing in the language of Rule 801(d)(2)(D) makes any distinction between civil and criminal actions." Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 778 (1990).

D. The Conflict Among the Circuits Has Been Acknowledged by the Courts, by Commentators, and by the Government Itself.

Five United States Courts of Appeals have explicitly acknowledged that they are divided on how to apply Rule 801(d)(2) to statements of government attorneys and agents in criminal cases. The Seventh Circuit, explaining its own contrary position, observed that "a number of courts have rejected that approach when dealing with statements made by government attorneys," citing the holdings of the First Circuit in *Kattar* and the D.C. Circuit in *Morgan*. *Zizzo*, 120 F.3d at 1351 n.4. See also *Garza*, 448 F.3d at 298 ("other circuits have declined to extend Rule 801(d)(2)(D) to statements made by government agents, especially in criminal trials"); *Kattar*, 840 F.2d at 131 (specifically rejecting holding of Seventh Circuit in *Powers*, adopting that of D.C. Circuit in *Morgan*); *Prevatte*, 16 F.3d at 779 n.9 (noting that Second and Seventh Circuits disagree with D.C. Circuit); *United States* v. *Yildiz*, 355 F.3d

80, 81 (2d Cir. 2004) (noting circuit split as to Rule 801(d)(2)(D)). See also *United States* v. *Bakshinian*, 65 F. Supp. 2d at 1108 (analyzing and explaining rejection of *McKeon* and *DeLoach*).

State courts—42 of which[15] must interpret state evidence rules that are modeled on the Federal Rules of Evidence—have pointed out the division among the federal circuits, and have divided among themselves. *E.g.*, *Allen* v. *State*, 787 N.E.2d 473, 478 (Ind. App. 2003) ("this issue has been addressed by numerous federal jurisdictions with varying results"); *State* v. *Pearce*, ___ P.3d ___, 2007 WL 1544152 at *11 (Ida. App. 2007) ("It is an area of law that has been significantly fractured;" calling *McKeon* a "seminal case" and the "most prominent approach"); *Harris* v. *United States*, 834 A.2d 106, 118-19 (D.C. 2003) (noting split among federal circuits, adopting First Circuit position); *State* v. *Therriault*, 485 A.2d 986, 992 & n.9 (Me. 1984) (noting split, adopting Seventh Circuit position); *People* v. *Cruz*, 643 N.E.2d 636, 664-65 (Ill. 1994) (adopting *McKeon* position); *State* v. *Ogden*, 640 A.2d 6, 11n. (Vt. 1993) ("Courts have split on this issue."); *State* v. *Asbridge*, 555 N.W.2d 571, 576 (N.D. 1996) (noting that "there appears to be some disagreement among the courts," adopting Seventh Circuit view); *State* v. *Brown*, 784 A.2d 1244, 1254-55 (N.J. 2001) (pointing out split).

Commentators likewise have recognized the circuit split. *E.g.*, ABA SECTION ON LITIGATION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 244-45 (3d ed. 1998) ("A third issue, and one that divides the courts, concerns whether the statement of

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[15] See 6 J. MCLAUGHLIN, ED., WEINSTEIN'S FEDERAL EVIDENCE T-1 to T-8 and T-107 to T-112 (2d ed. 2007).

a government agent is admissible against the government under Rule 801(d)(2(C) or (D)."); 4 C. MUELLER & L. KIRKPATRICK, FEDERAL EVIDENCE 459-60 (3d ed. 2007) (detailing split among circuits).

The government itself has acknowledged the disagreement in the circuits. In a brief filed four months ago the Justice Department's Criminal Division, in "urg[ing] the court to follow the Second, Seventh, and Eleventh Circuits," wrote:

> "The government recognizes that other courts have come out differently, holding that statements by prosecutors can bind the government. See *United States* v. *Kattar*, 840 F.2d 118, 130-31 (1st Cir. 1988); *United States* v. *Morgan*, 581 F.2d 933, 937-38 & n.10 (D.C. Cir. 1978); *United States* v. *Bakshinian*, 65 F. Supp. 2d 1104, 1105-09 (C.D. Cal. 1999)."[16]

In fact, the government's own position with respect to Rule 801(d)(2) has sometimes been in conflict with itself. See *United States* v. *Branham*, 97 F.3d 835, 851 (6th Cir. 1996), in which the Sixth Circuit observed that "The government concedes that Rule 801(d)(2)(D) contemplates that the federal government is a party opponent of the defendant in a criminal case."[17]

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[16]Government's Opposition to Defendant Smith's Motion in Limine To Introduce Government Admissions, *United States* v. *Convertino*, No. 2:06-CR-20173, E.D. Mich., at 7 (Oct. 2, 2007), 2007 WL 3168832.

[17]In its appellate brief in *Branham*, the government, citing *Morgan*, acknowledged that "Undoubtedly, the federal rules contemplate that the federal government is a party-opponent of the defendant in a criminal case." Brief of Cross-Appellant United States, *United States* v. *Branham*, Nos. 95-5357, -5213, -5241, -5490, U.S.C.A., 6th Cir., at 22 (Oct. 19, 1995).

II. TO PRECLUDE A FEDERAL CRIMINAL DEFENDANT FROM INFORMING THE JURY THAT THE GOVERNMENT ACKNOWLEDGED IMMUNIZING ONE OF ITS WITNESSES VIOLATES THE FIFTH AND SIXTH AMENDMENTS.

If Rule 801(d)(2) had been applied in this case as written—which at least five other circuits would have done—no constitutional issue would arise. But because petitioner was prevented from informing the jury of the government's prior statements, the third trial of petitioner did not comply with the Fifth and Sixth Amendments. When evidence was offered that "was highly relevant" and "substantial reasons existed to assume its reliability," then "'the hearsay rule may not be used mechanistically to defeat the ends of justice.'" *Green* v. *Georgia*, 442 U.S. 95, 97 (1979), quoting *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973).

In *Holmes* v. *South Carolina*, 547 U.S. 319, 330-31 (2006), this Court held that a trial court may not exclude exculpatory evidence bearing indicia of reliability just because the court credits the government's argument that that evidence should not be believed. That is because both the Fifth and Sixth Amendments guarantee criminal defendants "a meaningful opportunity to present a complete defense." *Id.* at 331, quoting *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986), and *California* v. *Trombetta*, 467 U.S. 479, 485 (1984). In *Giglio* v. *United States*, 405 U.S. 150 (1972), this Court unanimously held that due process requires that a jury, so it may assess credibility, must be allowed to know of the promise of immunity to a witness—even when (as in *Giglio* itself) prosecutors have made contradictory

statements as to whether such immunity had been conferred.

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

Napue v. *Illinois*, 360 U.S. 264, 269 (1959). Here the jury's "estimate of [Kearney's] truthfulness and reliability" was crucial, for two prior juries, having been informed of his immunity, had declined to convict.

This Court also recognized in *Washington* v. *Texas*, 388 U.S. 14, 19 (1967), that the Fifth and Sixth Amendments protect the defendant's "right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Yet the District Court here weighed and credited the government's "inadvertence" excuse on its own; the court did not even conduct an evidentiary hearing before it excluded the evidence, relying simply on the unsworn representation of government attorneys. The third jury never knew that the government had completely contradicted its own prior version of the facts as to Kearney's status. *Cf. United States* v. *Powers*, 467 F.2d at 1097-98 (Stevens, J., dissenting):

> "in my opinion the fact of the inconsistency may properly be brought to the attention of the jury and the government put to the burden of explaining how it could argue . . . two mutually exclusive propositions."

See also *DeMarco* v. *United States*, 928 F.2d 1074, 1076-77 (11th Cir. 1991) (government's suppression

of immunity agreement was not harmless error); *Haber* v. *Wainwright*, 756 F.2d 1520, 1523-24 (11th Cir. 1985) (ordering hearing on whether witness had received undisclosed immunity).[18]

Decisions of the First, Fourth and Fifth Circuits hold that the Fifth and Sixth Amendments guarantee a criminal defendant the right both to inform the jury of credible evidence that a government witness has been granted immunity, and to argue to the jury that they should give that evidence weight in assessing such a witness's credibility.

> "It has been settled for some time that *due process requires a defendant be given the opportunity to present evidence* concerning *any promises, understandings or agreements* between the government and a key prosecution witness relating to the witness' testimony."

United States v. *Mitchell*, 886 F.2d 667, 670 (4th Cir. 1989) (emphasis supplied). See also *Ouimette* v. *Moran*, 942 F.2d 1, 11 (1st Cir. 1991) ("[T]he jury did not know and should have known the full extent of promises and deals made by the prosecutor in return for [the witness's] testimony."); *United States* v. *Barham*, 595 F.2d 231, 243 (5th Cir. 1979) ("Barham was entitled to a jury that, before deciding which story to credit, was truthfully apprised of any

---

[18] The same principle is applied in civil cases. *E.g.*, *Huey* v. *Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) ("Despite the fact that Honeywell later amended its answers to deny this allegation, Honeywell's admissions are still admissible evidence, though not conclusive . . . ."); *Williams* v. *Union Carbide Corp.*, 790 F.2d 552, 556 (6th Cir. 1986) ("The plaintiff's arguments that the statements were made merely to preserve legal rights may be quite persuasive, but should have been made to the jury.").

possible interest of any Government witness in testifying falsely."), *cert. denied*, 450 U.S. 1002 (1981). The District of Columbia Court of Appeals also has held that to keep from the jury a government attorney's contrary statements in an earlier memorandum to the court was a critical denial of basic defense guarantees that "went to the heart of [the] defense." *Freeland* v. *United States*, 631 A.2d 1186, 1192, 1195 (D.C. 1993) (citing *Giglio*, *Kattar*, *Morgan*, and dissent of then Judge Stevens in *Powers*).

III. THE ISSUES ARE FAR-REACHING, IMPORTANT AND OVERDUE FOR RESOLUTION.

This is a federal prosecution. Government grants of immunity, including informal immunity, to key witnesses happen every day, throughout the country. Informal grants, such as the government described the one to Kearney here, C.A.A. 761, are frequent and more common than statutory grants. 2 S. BEALE, ET AL., GRAND JURY LAW & PRACTICE § 7.11 at 7-37 (2d ed. 2005); 3 CRIMINAL PRACTICE MANUAL § 89:3 (Thomson-West 2007).

If a defendant in a federal criminal prosecution cannot inform the jury of such a grant of immunity—and if the government can so admit, but in a later trial erase its admission, leaving the jury none the wiser—then the entire dynamic of federal criminal justice will have changed.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

BRENDAN V. SULLIVAN, JR.
JOHN G. KESTER *
BARRY S. SIMON

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Attorneys for Petitioner

February 5, 2008

*Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Oct. 3, 2007]

CORRECTED[*]

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

[* This order was originally filed October 1, 2007, then reissued in a different format as a corrected order October 3, 2007. None of the persons listed in the caption as "Interested Parties" was a party. E. Kirk Shelton was convicted in the first trial and was not a party in the second or third trials, nor in this appeal.]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of October, two thousand and seven.

PRESENT:

HON. ROGER J. MINER
HON. JOSE A. CABRANES,
Circuit Judges,
HON. PAUL A. CROTTY,*
District Judge.

No. 07-0348-cr(L)
No. 07-2313-cr(con)

UNITED STATES OF AMERICA,
Appellee,

v.

WALTER A. FORBES,
Defendant-Appellant.

E. KIRK SHELTON,
Defendant,

ANNE M PEMBER, ERNST & YOUNG LLP, COSMO CORIGLIANO, CASPER SABATINO, DELOITTE & TOUCHE, KEVIN KEARNEY, BLOOMBERG NEWS, STEVEN SPEAKS, CENDANT CORPORATION, CRYSTAL

---

* The Honorable Paul A. Crotty of the United States District Court for the Southern District of New York, sitting by designation.

JOURNEY CANDLES LLC, AGNES T CORIGLIANO, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, ARPS, SLATE, MEAGHER, FLOM, LLP'S, KPMG LLP, MARY SATHER POLVERARI, US SECURITIES & EXCHANGE COMMISSION, PATTERSON BELKNAP WEBB & TYLER LLP, HENRY R SILVERMAN, DECOTIIS FITZPATRICK COLE & WISLER LLP, KRAMER LEVIN NAFTALIS & FRANKEL LLP, PETER H LEWIS, JULIA HEIMAN, PETER ROY-BYRNE, ROBERT M SARKIE, AMY LIPTON, DAVID WYSHNER, ANTHONY G. PETRELLO, SANDY BERRY, ALAN BITTKER, BRENDA BREITENBACH, COLLEEN CHANEY, JAMES CITRO, KEVIN CROWE, ROBERT DUFOUR, EVA VINICZAY FOOTHORAP, BRIAN FOSTER, JOHN FOX, J[illegible]IN J FULLMER, BIRGIT PHILIPP GENTILE, JEFFREY GERSHOWITZ, IBILOLA GREEN, RONALD A GUGGENHEIMER, SCOTT HANCOCK, GREG HILINSKI, CINDY HODNETT, PEGGY HOUREN, ELISA LANTHIER-JENNINGS, TERRY JOHNSON, KENNETH KEITH, TRICIA FLYNN KEMP, MICHAEL KILDUFF, WILLIAM KING, ANDREW KLAUS, PETER G MCGONAGLE, ANTHONY L MENCHACA, MARK METCALF, KATHLEEN MILLS, MANDY MORRIS, LORRAINE ORBAN, MARY S PETERSON, LISA PLUCINSKI, KATHRYN JANE POPE, MARIAN ROBERGE, RICHARD SCHWAMB, DANA JEANINE SMITH, JEFF SMITH, JENNIFER TAUB, BRUCE TOLLE, WILLIAM C TOMSON, PETER WRAGG, RONALD R RICKLES, ROBERT J. CLEARY, DAVID FROHLICH, SUSAN WOYNA, AUDREY STRAUSS, PETER GONEDES, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, EDWARD S NATHAN, HERBERT J STERN, JAMES E BUCKMAN, JEFFREY D SMITH, JOHN H CARLEY, LEONARD S COLEMAN, CHRISTEL DEHAAN, MARTIN L EDELMAN, SCOTT E FORBES, ROBERT D KUNISCH, MICHAEL P MONACO, BRIAN MULRONEY, ROBERT E NEDERLANDER, E. JOHN

ROSENWALD JR., LEONARD SCHUTZMAN, JOHN D SNODGRASS, AMY SHELTON,

Interested-Parties.

APPEARING FOR APPELLANT:

BARRY S. SIMON, (Brendan V. Sullivan, Jr., James T. Cowdery, *on the brief*), Williams & Connolly LLP, Washington, D.C.

APPEARING FOR APPELLEE:

MARK E. COYNE, Special Assistant United States Attorney, (Christopher Christie, United States Attorney, George S. Leone, John G. Silbermann, Special Assistant United States Attorneys, *on the brief*), United States Attorney's Office for the District of New Jersey, Newark, NJ, *appearing as Special Attorneys for the United States Department of Justice.*

Appeal from judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Defendant-appellant Walter Forbes appeals from the judgment of conviction of conspiracy in violation of 18 U.S.C. § 371 and making false statements in a report to be filed with the SEC in violation of

15 U.S.C. § 78ff(a). He was sentenced principally to twelve years and seven months' imprisonment and ordered to pay restitution of $3.275 billion. Forbes seeks review of over nine alleged trial and sentencing errors. We assume the parties' familiarity with the underlying facts, the prolonged and complex procedural history, and the issues on appeal.

We review a district court's evidentiary rulings for "abuse of discretion," reversing only where a challenged ruling "rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions." *United States v. Gonzalez*, 420 F.3d 111, 120 (2d Cir. 2005) (internal quotation marks omitted). Where the defendant failed to object at trial, we review evidentiary rulings for plain error. *United States v. Hourihan*, 66 F.3d 458, 463 (2d Cir. 1995). We review a district court's decision not to compel the government to choose between granting immunity to defense witnesses or forgoing its own use of immunized testimony for abuse of discretion and its factual findings as to the Government's acts and motives for clear error. *United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006). Our review of the refusal to provide a missing witness instruction is for "abuse of discretion." *Id.* at 124.

Forbes argues that the District Court erroneously blocked his attempts to introduce two prior inconsistent prosecutorial statements—(i) that one of its witnesses had received informal immunity; and (ii) that another of its witnesses was to testify that he was uncertain whether Forbes or E. Kirk Shelton, former COO of Cendant and Forbes' former co-defendant, had order [*sic*] certain redactions to Board minutes—in violation of FRE 801(d)(2) and the Due Process

Clause. Forbes also asserts that the District Court erred in refusing to provide an informal immunity instruction given to the jury at the prior two trials but which the Government had since learned was mistaken. Because the Government offered a sufficient explanation for the mistaken jury instruction with regard to one witness' informal immunity and because its proffer with respect to another witness was not an admission by a party opponent, the District Court did not abuse its discretion. *See Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168-69 (2d Cir. 2001) ("error of law" is "abuse of discretion").

Forbes' challenge to the Government's allegedly "selective" grant of immunity to defense witnesses, in particular its refusal to grant former CFO Stuart Bell immunity, is foreclosed by our holding on a similar issue in *Ebbers*. 458 F.3d at 119. Accordingly, the District Court's refusal to compel a grant of immunity and to issue a missing witness instruction did not constitute an abuse of discretion.

Forbes also argues that the District Court abused its discretion in permitting lay opinion testimony on the size of the alleged fraud and further erred by declining to give a limiting instruction concerning a similar reference in the Government's Opening Statement. The disputed testimony about the size of the fraud was properly limited, pursuant to the District Court's instructions, to the issue of materiality. The District Court correctly ruled that references to the decline in Cendant's stock price or investor losses were probative on the issue of materiality and permissible under Federal Rule of Evidence 403. For similar reasons, the use of the term "$14 billion fraud" in the Government's opening statement was not misleading and was not unduly prejudicial. Ac-

cordingly, we hold that no abuse of discretion or error of law occurred.

We have considered all of the issues raised, including those noted above, and the relevant law, and conclude that all of defendant's arguments are without merit.

The judgment of the District Court is AFFIRMED.

FOR THE COURT,

Catherine O'Hagan Wolfe, Clerk of Court

By: _____

Oliva M. George, Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

[Filed DEC 4, 2007]

Date:
DC Docket Number: 02-cr-264

Docket Number: 07-0348-cr
DC: CONNECTICUT (NEW HAVEN

Short Title: USA v. Forbes
DC Judge: Honorable Alan Nevas

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of December, Two Thousand Seven.

Docket Numbers: 07-0348-cr (L)
07-2313-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

v.

WALTER A. FORBES,
Defendant-Appellant,

E. KIRK SHELTON,
Defendant,

ANNE M PEMBER, ERNST & YOUNG LLP, COSMO CORIGLIANO, CASPER SABATINO, DELOITTE & TOUCHE, KEVIN KEARNEY, BLOOMBERG NEWS, STEVEN SPEAKS, CENDANT CORPORATION, CRYSTAL JOURNEY CANDLES LLC, AGNES T CORIGLIANO, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, ARPS, SLATE, MEAGHER, FLOM, LLP'S, KPMG LLP, MARY SATTLER POLVERARI, US SECURITIES & EXCHANGE COMMISSION, PATTERSON BELKNAP WEBB & TYLER LLP, HENRY R SILVERMAN, DECOTIIS FITZPATRICK COLE & WISLER LLP, KRAMER LEVIN NAFTALIS & FRANKEL LLP, PETER H LEWIS, JULIA HEIMAN, PETER ROY-BYRNE, ROBERT M SARKIE, AMY LIPTON, DAVID WYSHNER, ANTHONY G. PETRELLO, SANDY BERRY, ALAN BITTKER, BRENDA BREITENBACH, COLLEEN CHANEY, JAMES CITRO, KEVIN CROWE, ROBERT DUFOUR, EVA VINICZAY FOOTHORAP, BRIAN FOSTER, JOHN FOX, JOHN J FULLMER, BIRGIT PHILIPP GENTILE, JEFFREY GERSHOWITZ, IBILOLA GREEN, RONALD A GUGGENHEIMER, SCOTT HANCOCK, GREG HILINSKI, CINDY HODNETT, PEGGY HOUREN, ELISA LANTHIER-JENNINGS, TERRY JOHNSON, KENNETH KEITH, TRICIA FLYNN KEMP, MICHAEL KILDUFF, WILLIAM KING, ANDREW KLAUS, PETER G MCGONAGLE, ANTHONY L MENCHACA, MARK METCALF, KATHLEEN MILLS, MANDY MORRIS, LORRAINE ORBAN, MARY S PETERSON, LISA PLUCINSKI, KATHRYN JANE POPE, MARIAN ROBERGE, RICHARD SCHWAMB, DANA JEANINE SMITH, JEFF SMITH, JENNIFER TAUB, BRUCE TOLLE, WILLIAM C TOMSON, PETER WRAGG, RONALD R RICKLES, ROBERT J. CLEARY, DAVID FROHLICH, SUSAN WOYNA, AUDREY STRAUSS, PETER GONEDES, FRIED, FRANK, HARRIS, STRIVER & JACOBSON LLP, EDWARD S NATHAN, HERBERT J STERN, JAMES E BUCKMAN, JEFFREY D SMITH, JOHN

H CARLEY, LEONARD S COLEMAN, CHRISTEL DEHAAN, MARTIN L EDELMAN, SCOTT E FORBES, ROBERT D KUNISCH, MICHAEL P MONACO, BRIAN MULRONEY, ROBERT E NEDERLANDER, E. JOHN ROSENWALD JR., LEONARD SCHUTZMAN, JOHN D SNODGRASS, AMY SHELTON,

Interested-Parties.[*]

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Walter Forbes. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: [Illegible]
Motion Staff Attorney

[* See footnote on p. 1a.]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed October 24, · 006]

NO: 3:02CR0264(AHN)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WALTER FORBES, *et al*,
Defendants.

DAY ELEVEN OF TRIAL

BEFORE: THE HONORABLE ALAN H. NE\ AS, U.S.D.J. AND JURY OF FOURTEEN

* * * *

[3170] THE COURT: Correct. So you will down oad that tonight. The other ruling you're waiting for is a request—Mr. Forbes' request to admit into evidence the government's statements in its briefs in the previous trials regarding the existence of an immunity agreement for Kevin Kearney. And I'm prepared to rule on that now. And I'll read that. It's not lengthy.

Statements and briefs filed by the government during the previous two trials which make reference to the fact that Kevin Kearney was testifying pursuant to an immunity agreement are not admissible as government admissions as the Court has determined that an innocent explanation exists for the statements. See *United States against McKeon* 738 F.2d, 26 at page 33, 2d Cir. 1984. See also *United*

States versus GAF Corp. 928 F.2d 1253 at page 1260, 2d Cir. 1991 (Noting that a party should not be able to conceal an inconsistency if the change was made, "wholly without explanation.")

At this trial, Mr. Kearney, that's Kevin Kearney, has testified unequivocally to the fact that he received no offers of immunity from the government either formal or informal, oral or written in exchange for his testimony. Specifically Mr. Kearney stated on cross-examination as follows: Question: Did you receive at some time the good news that you would not be [3171] prosecuted? Answer: No. Question: You were simply told that you would not be a target of the investigation? Answer: Yes. This is trial transcript at 840.

On redirect, Mr. Kearney further confirmed that no immunity agreement existed. Question: Mr. Kearney, I want to start out where defense counsel started out. The first question is, how long you had been cooperating with the government. Just so the record is clear, have you ever pled guilty to a crime? Answer: No. Question: Did you reach any agreement of—cooperation agreement with the government? Answer: No. Question: You are not here in the hopes of receiving anything in return for your testimony? Answer: No. Question: The fact that you testified has no bearing upon your second civil case, did it? Answer: No. Question: Has no bearing upon the government's decision as to whether or not they are going to prosecute you, there's no agreement to that effect is there? Answer: No. Question: In fact, you are here pursuant to a subpoena here today? Answer: Yes. Question: Did you ask to come and testify? Answer: No.

Trial transcript 846-841.

The government has now corroborated Mr. Kearney's testimony and acknowledges that its [3172] references to Mr. Kearney's immunity agreement in briefs filed in the previous two trials were made in error. There is no more innocent explanation than admitting a mistake in order to eliminate the apparent inconsistency between the government's assertions in its court filings and Mr. Kearney's testimony. Mr. Forbes shall not be allowed to draw any inferences regarding the existence of a an immunity agreement when the undisputed facts establish that no such agreement exists. Accordingly, Mr. Forbes' request to admit into evidence the government's statements in its briefs in the previous trials regarding the existence of an immunity agreement for Kevin Kearney is denied.

* * * *

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 3:02CR264(AHN)

UNITED STATES OF AMERICA,

v.

WALTER A. FORBES.

RULING ON DEFENDANT'S MOTION FOR A NEW TRIAL

Pending before the court in this criminal securities fraud case is the motion of defendant, Walter A. Forbes ("Forbes"), for a new trial pursuant to Fed. R. Crim. P. 33. Forbes asserts that the interests of justice require this court to vacate the judgment of conviction and grant him a new trial. For the following reasons, Forbes's motion is denied.

* * * *

V. *There Was No Basis to Allow Forbes to Offer Government Pleadings as Admissions*

* * * * *

The court also did not abuse its discretion by excluding as admissions under Rule 801(d)(2), the government's written submissions from the first trial in which it mistakenly agreed with Forbes's proposed jury instructions that Kevin Kearney had benefitted from an informal immunity agreement. As previously discussed, Kearney did not, as a matter of undisputed fact, receive any form of immunity. Thus, because

there was an innocent explanation for the supposed inconsistency that Forbes sought to take advantage of, the court did not abuse its discretion in ruling that the government submissions were not admissible under Rule 801(d)(2), *see United States v. Salerno*, 937 F.2d 797, 784 (2d Cir. 1991), or pursuant to *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991).

* * * *

CONCLUSION

For the foregoing reasons, Forbes's motion for a new trial [doc. # 2606] is DENIED.

SO ORDERED this 17th day of January, 2007 at Bridgeport, Connecticut.

/s/ _____
Alan H. Nevas
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 3:02CR264(AHN)

UNITED STATES OF AMERICA,

v.

WALTER A. FORBES.

RULING ON DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

Pending before the court in this criminal securities fraud case is the motion of the defendant, Walter A. Forbes ("Forbes"), for release pending appeal pursuant to 18 U.S.C. § 3143. The defendant maintains that there are six substantial issues that are likely on appeal to result in reversal of his conviction or a new trial. The court disagrees, and for the following reasons denies the defendant's motion.

* * * *

B. *Government "Admissions"*

The defendant's claim that the court erroneously ruled that certain statements made by government attorneys were not admissible as admissions of a party opponent under Fed. R. Evid. 801(d)(2) also does not present a close or substantial question.

The government's written submission at the first trial in which it mistakenly agreed with the defendant's proposed jury instruction that a cooperating witness had benefitted from an informal immunity

agreement was not an admission under Rule 801(d)(2). The witness did not, as a matter of undisputed fact, receive any form of immunity, and thus there was an innocent explanation for the supposed inconsistency and the defendant was correctly precluded from improperly taking advantage of the government's innocent mistake. *See United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (noting that before a prior statement may be admitted under Rule 801(d) (2) the court must, *inter alia*, determine by a preponderance of the evidence that the inferences sought to be drawn from the inconsistency are fair and that innocent explanations do not exist).

* * * *

CONCLUSION

For the foregoing reasons, the defendant has not sustained his burden of showing a substantial question of law or fact that is likely to result in reversal of his conviction or a new trial. Accordingly, his motion for release pending appeal [doc. # 2640] is DENIED. The defendant is ordered to surrender to the institution designated by the Bureau of Prisons on July 16, 2007 to begin serving his sentence.

SO ORDERED this 25th day of April, 2007 at Bridgeport, Connecticut.

/s/ _____
Alan H. Nevas
United States District Judge

APPENDIX F

CONSTITUTIONAL PROVISIONS AND RULE

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 801 of the Federal Rules of Evidence provides:

Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by a person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption

or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Apr. 18 08

No. 07-1029

In the Supreme Court of the United States

WALTER A. FORBES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding statements made by prosecutors during two prior trials that a government witness had received immunity from prosecution, when the government established before petitioner's third trial, and the court found it undisputed, that the earlier statements were mistaken and that the witness had not received immunity.

2. Whether the district court's exclusion of the prior statements at petitioner's third trial violated petitioner's rights under the Fifth and Sixth Amendments.

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In the Supreme Court of the United States

No. 07-1029

WALTER A. FORBES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2007, and was reissued on October 3, 2007. A petition for rehearing was denied on December 4, 2007 (Pet. App. 8a-10a). The petition for a writ of certiorari was filed on February 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of conspiring to make false statements in reports required to be filed with the Securities

and Exchange Commission (SEC), in violation of 18 U.S.C. 371; and on two counts of making false statements in reports required to be filed with the SEC, in violation of 15 U.S.C. 78ffa. He was sentenced to 151 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $3.275 billion in restitution. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner is the former chief executive officer (CEO) and chairman of the board of directors of CUC International, Inc. (CUC), and the former chairman of CUC's successor, Cendant Corp. (Cendant). CUC/Cendant sold memberships to consumers that provided discounts for, inter alia, travel, shopping, dining, and insurance services. During the 1990s, petitioner directed a massive accounting fraud that involved CUC/Cendant's public dissemination, in press releases and in annual and quarterly filings with the SEC, of materially and fraudulently inflated earnings figures. Gov't C.A. Br. 2, 8-9.

A principal goal of the scheme was to overstate CUC's earnings in order to meet or exceed earnings "targets" published by Wall Street securities analysts. Because CUC/Cendant publicly reported that it consistently hit those targets, investors paid more for shares of CUC/Cendant stock than they would have paid if the company had accurately disclosed its earnings. Petitioner benefitted directly from the fraud because he was compensated in large part by options to purchase CUC/Cendant stock. On April 15, 1998, when the fraud was exposed, the value of Cendant's stock plummeted by 47% in a single day. Cendant's stock price continued to fall during the following weeks, resulting in an overall

loss of more than $20 billion in shareholder value. Gov't C.A. Br. 2-3, 8-9.

2. In July 2001, a grand jury sitting in the District of New Jersey returned a superseding indictment against petitioner and co-defendant E. Kirk Shelton, the former president and chief operating officer of CUC. The United States District Court for the District of New Jersey transferred the case to the District of Connecticut. The government subsequently obtained a second superseding indictment from a grand jury sitting in the District of Connecticut. Gov't C.A. Br. 3-4.

In 2004, petitioner and co-defendant Shelton were tried before a jury in a trial lasting more than seven months. See C.A. App. 99-164. The jury found Shelton guilty on all 12 counts against him. The jury was unable to reach a verdict on any count against petitioner, and the district court declared a mistrial. Gov't C.A. Br. 4.

The government elected to retry petitioner on a redacted four-count indictment that included one conspiracy count, two counts of making false statements to the SEC, and one count of securities fraud. Between October 2005 and February 2006, petitioner was tried a second time before a jury. The jury was unable to reach a verdict on any count, and the district court again declared a mistrial. Gov't C.A. Br. 5.

In October 2006, petitioner was tried a third time before a jury in a three-week trial. The jury found petitioner not guilty on the securities-fraud count, but it found him guilty on the conspiracy count and the two false statements counts. Gov't C.A. Br. 5-7.

3. The principal government witnesses at petitioner's third trial were Cosmo Corigliano, CUC's chief financial officer (CFO); Henry Silverman, Cendant's CEO; Michael Monaco, Cendant's CFO; and Anne

Pember, CUC's controller. See C.A. App. 7783-7797, 7836-7919, 7924-8073, 8097-8153, 8158-8201, 8224-8239 (Monaco—more than 360 pages); *id.* at 8706-8867, 8895-8945 (Silverman—more than 210 pages); *id.* at 8394-8488, 8496-8676 (Pember—more than 270 pages); *id.* at 9075-9309, 9338-9578, 9635-9750, 9772-9815, 9822-9862, 9883-9984 (Corigliano—more than 760 pages). Silverman was a new witness who had not testified at the prior two trials and whose testimony contradicted petitioner's testimony when petitioner took the stand in his own defense. Gov't C.A. Br. 6-7. Silverman corroborated petitioner's role in the conspiracy, including petitioner's persistent lobbying to keep Pember in a position that would enable her to continue to conceal the fraud and to keep Ernst & Young as the auditor for at least CUC's side of Cendant. C.A. App. 8710-8792.

Corigliano testified as a cooperating government witness and explained the fraud. He was the controller at CUC and later replaced Stuart Bell as the CFO when Bell left the company. C.A. App. 9080-9082, 9107-9109. Corigliano pleaded guilty to conspiracy and wire fraud. *Id.* at 9254-9257.

According to Corigliano's testimony, petitioner told Corigliano, when Corigliano took over as CFO, that petitioner wanted to make sure that CUC "hit the numbers Wall Street was expecting." C.A. App. 9117. Petitioner also told Corigliano that CUC needed to realize operating growth of at least 25% per year to maintain its status as a growth company. *Id.* at 9117, 9143. Corigliano prepared "cheat sheets" for petitioner that showed the use of merger reserves to overstate CUC/Cendant's income and to match the numbers reported to Wall Street analysts. *Id.* at 9118-9119, 9124, 9128-9129, 9132, 9142, 9164-9165. Corigliano met with petitioner at least quar-

terly, before each press release, to decide what numbers should be reported and to discuss the use of merger reserves to inflate CUC/Cendant's income. *Id.* at 9122, 9135-9136. Corigliano instructed his subordinates to make "topside adjustments" to the consolidated financial statements from the merger reserves that had the effect of overstating CUC's earnings.[1] *Id.* at 9139-9140.

Kevin Kearney, the manager of financial reporting at CUC, testified as a government witness at all three trials. According to Kearney's testimony, he was instructed by Corigliano and Bell to make unsupported topside adjustments to the consolidated financial statements that had the effect of overstating CUC's earnings. C.A. App. 8253-8255, 8260, 8271-8274, 8277, 8291-8292. At the end of each quarter, Corigliano or Bell told Kearney to make topside adjustments to achieve a specified earnings per share number because that was the number that petitioner wanted. *Id.* at 8274-8283.

Most of Kearney's comparatively brief direct testimony at petitioner's third trial (C.A. App. 8240-8296) described the undisputed mechanics of the accounting fraud—subjects that other witnesses, including Corigliano and Pember, covered in greater detail. Kearney did add that he was told by Corigliano and Bell that petitioner had ordered some of the fraudulent accounting entries and that certain information could not be released to Ernst & Young until petitioner had "blessed" the release. *Id.* at 8274-8281, 8285-8290. Kearney admitted, however, that he did not have personal knowledge of petitioner's involvement. *Id.* at 8302-8310.

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[1] Corigliano explained that a topside adjustment "wasn't reported on any individual division books" but "was recorded at the top of the organization and, thus, the name topside adjustment." C.A. App. 9139.

The investigation and prosecution of this case was sufficiently long and involved that it was conducted by numerous prosecutors, in three successive teams. The initial prosecutorial team was led by Assistant United States Attorney (AUSA) Paul Weissman, who performed many investigatory interviews of Kearney, but who left before the case was transferred to the District of Connecticut. *Id.* at 10165-10166, 10185, 10278-10293; Crim. No. 01-cr-140 Docket pp. 4-5 (D.N.J.). By the time of the first trial, the case was being handled by a new team led by AUSA John Carney. C.A. App. 39-41, 44.

When petitioner submitted his proposed jury instructions, the new prosecutorial team "join[ed] in" numerous instructions, including one stating that two government witnesses, including Kearney, "ha[d] been promised by the government that, in exchange for their testimony, they [would] not be prosecuted for any crimes they may have admitted either here in court or in interviews with the government." C.A. App. 2128, 2131. The district court so instructed the jury, cautioning the jury to "scrutinize [Kearney's testimony] closely" because Kearney had "a motive to falsify his testimony." *Id.* at 4926-4927. Before the second trial, a new, third team of prosecutors took over, *id.* at 178, and the new team proposed that the same jury instructions be used again, *id.* at 395-396, 2135. The government subsequently agreed to a modified instruction that added that the promise not to prosecute "was not a formal order of immunity by the Court, but was arranged directly between the witness and the government." *Id.* at 2137, 2139. The district court so instructed the jury, again cautioning the jury to "scrutinize [Kearney's testimony] closely" because

Kearney had "a motive to falsify his testimony." *Id.* at 5879-5880.[2]

Before the third trial, the third team of prosecutors investigated and determined that Kearney had not in fact been granted immunity from prosecution. C.A. App. 1673-1676, 7015-7016, 7019-7021, 7029-7030, 7038; C.A. Gov't Supp. App. 11-17. Months before the third trial, the government informed the district court that the jury instruction given in the prior trials was "factually erroneous" because Kearney had not been granted informal immunity. C.A. App. 1673-1676. The government explained that Kearney had instead provided information pursuant to proffer agreements, which limited the extent to which the government could use in a subsequent criminal proceeding any statement made by Kearney, but which did not preclude the government from prosecuting Kearney based on information it acquired through other means. *Id.* at 1674-1675. The government proposed a supplemental jury instruction concerning a witness testifying pursuant to a proffer agreement. *Id.* at 1677-1678. Petitioner objected to the supplemental jury instruction, arguing that the instruction given in

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[2] At the second trial, petitioner moved to strike part of the government's closing rebuttal argument. C.A. App. 727-728. In the portion of the argument to which petitioner objected, government counsel observed that Kearney had not testified pursuant to a cooperating plea agreement, and then asked the rhetorical question, "does [Kearney] have a motivation beyond that of an ordinary witness?" *Id.* at 760-761. In its response to the motion to strike, the government explained that "[t]he purpose of the question was to contrast the motivation of a witness who has already received the benefit of an informal immunity agreement at the time of his testimony, and the very different motivation of a witness who has yet to receive the full benefit of a cooperation agreement at the time of his testimony because that witness has not yet been sentenced." *Id.* at 761.

the two prior trials should be given at the third trial as well. *Id.* at 1710-1713.

At the pretrial charge conference on September 20, 2006, the government reiterated that there was "simply no basis," C.A. App. 7016, for the jury instruction given in the two prior trials because "there [was] no immunity agreement with respect to Mr. Kearney, either oral or written," *id.* at 7015. The government stated that it was "embarrassed to admit" that its agreement to the instruction at the prior trials was a "matter of inadvertence." *Id.* at 7014. The government represented that Kearney would testify that he did not have immunity, that the former prosecutors said he did not have immunity, and that Kearney's counsel said that he did not have immunity. *Id.* at 1786, 2148-2149, 7015-7016, 7021. Petitioner continued to urge that the instruction should be given. *Id.* at 7023-7026, 7067-7068. After hearing arguments from both parties, the district court deferred ruling on the instruction until after Kearney testified. *Id.* at 7022-7023, 7026-7027, 7033, 7038-7039, 7069.

Shortly thereafter, petitioner asked the district court to rule on the matter before trial, arguing that an informal immunity instruction should be given because Kearney had received informal immunity. C.A. App. 1725-1730. Petitioner also asserted that the government's prior filings and representations provided an evidentiary basis for the instruction because they were "admissible as statements of a party-opponent." *Id.* at 1729; see Fed. R. Evid. 801(d)(2). The government opposed the request on the ground that the evidence would likely show that Kearney was not promised immunity in exchange for his testimony. C.A. App. 1786, 1787; C.A. Gov't Supp. App. 11-17. The government explained its change in position as the result of an "inadvertent fail-

ure, during the first two trials, to notice that the Kearney instruction was erroneous as a matter of fact." C.A. App. 1787.

After the jury was selected, the trial began on October 10, 2006, and Kearney testified on the third day of trial. C.A. App. 8083, 8239. On direct examination, *id.* at 8296-8297, on cross-examination, *id.* at 8348-8350, and on redirect examination, *id.* at 8355-8356, Kearney unequivocally denied that he had been promised anything by the government in exchange for his testimony. Kearney was recalled as a witness on the eighth day of trial, and he again testified that he had not been promised anything before providing information to the government. *Id.* at 9616-9617. Kearney's testimony on that point was corroborated by Michael Kozik, the former general counsel of the Connecticut State Board of Accountancy, who testified about a 2002 conversation with AUSA Carney reviewing Kearney's cooperation with the government, during which AUSA Carney never represented that Kearney had any agreement with or promises from the government concerning his cooperation. *Id.* at 9627-9628; see *id.* at 9629-9632.

4. On the tenth day of trial, October 23, 2006, petitioner moved for the first time to admit the government's prior statements to the effect that Kearney had been promised immunity from prosecution in exchange for his testimony. C.A. App. 2120-2120f. Petitioner relied on Federal Rule of Evidence 801(d)(2), which provides that admissions by a party-opponent are not hearsay, and on Second Circuit cases holding that in-court statements by attorneys (including government counsel) are encompassed by that rule. See C.A. App. 2120-2120a, 2120c-2120d. The government opposed the motion. *Id.* at 2144-2152. In its brief, the government cor-

roborated Kearney's testimony by reiterating that it had contacted Kearney's counsel, Robert Fettweis, and each of the former prosecutors who would have been in a position to immunize Kearney, and that all of them had confirmed that the government had never offered Kearney immunity in exchange for his testimony, either orally or in writing. *Id.* at 2148-2149; see *id.* at 1673-1676, 7014-7016, 7019-7021, 7029-7030, 7038; C.A. Gov't Supp. App. 14-15.

The same day, the district court held a hearing pursuant to Federal Rule of Evidence 104 at petitioner's request, but petitioner did not seek to present evidence on the issue of Kearney's purported immunity, choosing instead to address other issues. See C.A. App. 10105-10229. AUSA Carney was the lead prosecutor for the first trial, had helped prepare Kearney to testify in that trial, and had first agreed to the instruction stating that Kearney had been given immunity. *Id.* at 9321-9323, 9622, 10429. Petitioner elected not to call AUSA Carney as a witness (*id.* at 10428-10429), despite having Carney under defense subpoena (*id.* at 9002-9004, 9023, 9311-9323, 9484-9485, 10428-10429), and despite representing earlier in the trial that petitioner would call him and question him on this subject and others (*id.* at 9318; see *id.* at 9322-9323, 9596, 9690, 9752, 9820-9821, 10089-10091, 10097, 10390-10394). And when petitioner called AUSA Weissman to testify at the Rule 104 hearing and later before the jury, *id.* at 10164-10166, 10178-10180, 10185-10186, 10278-10293, petitioner did not question him concerning Kearney's purported immunity.

Apart from the government's own statements in its filings during the two prior trials, the only evidence submitted by petitioner to support his claim that an immunity agreement existed was a letter dated May 5, 2000,

from Fettweis to the SEC about a proposed settlement of a civil enforcement action against Kearney. C.A. App. 1743-1751. That letter stated that "at no time did the U.S. Attorney's Office condition its own agreement with Kearney upon his simultaneous willingness to cooperate with the [SEC]." *Id.* at 1749. As the government explained to the district court, however, Fettweis confirmed that he had never entered into any kind of immunity agreement with the government on behalf of Kearney. *Id.* at 2148, 7016. Rather, Fettweis explained that his use of the word "agreement" in the letter was an "unfortunate" word choice because the government had never agreed not to prosecute Kearney. C.A. Gov't Supp. App. 16-17. (As set forth above, see p. 7, *supra*, the government had entered only into proffer agreements with Kearney.) Although petitioner had subpoenaed Fettweis to testify at the October 23, 2006, Rule 104 hearing, see C.A. App. 9485, petitioner ultimately did not call Fettweis as a witness, see *id.* at 10410-10411.

On October 24, 2006, the day after the Rule 104 hearing, the district court denied petitioner's request to admit the prior statements into evidence. Pet. App. 11a-13a.[3] Relying on *United States* v. *McKeon*, 738 F.2d 26,

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[3] In stating (Pet. 14) that the district court excluded the government's prior statements "at the beginning of the third trial," and that the court "saw no need even for an evidentiary hearing," petitioner suggests that the district court ruled peremptorily without compiling an adequate record. In fact, the district court made clear at the pretrial charge conference on September 20, 2006, that the court would not decide whether to instruct the jury that Kearney had received immunity until Kearney had testified and had been questioned on that point. See C.A. App. 7022-7039. Petitioner did not seek to have the government's prior statements admitted into evidence until October 23, 2006—the tenth day of trial—and the district court denied the request the following day. By that time Kearney and former AUSA Weissman

33 (2d Cir. 1984), the court explained that "[s]tatements and briefs filed by the government during the previous two trials which make reference to the fact that Kevin Kearney was testifying pursuant to an immunity agreement are not admissible as government admissions as the Court has determined that an innocent explanation exists for the statements." Pet. App. 11a. The court noted that Kearney had "testified unequivocally to the fact that he received no offers of immunity from the government[,] either formal or informal, oral or written[,] in exchange for his testimony." *Id.* at 12a. The court also noted that the government had "corroborated Mr. Kearney's testimony and acknowledge[d] that its references to Mr. Kearney's immunity agreement in briefs filed in the previous two trials were made in error." *Id.* at 13a. The court concluded that petitioner would "not be allowed to draw any inferences regarding the existence of * * * an immunity agreement when the undisputed facts establish that no such agreement exists." *Ibid.*

5. After the jury returned its guilty verdicts, petitioner moved for a new trial. Petitioner argued, inter alia, that the district court had abused its discretion in declining to admit the government's prior statements to the effect that Kearney had received informal immunity from prosecution. The district court denied the motion.

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had testified, and petitioner had elected not to call as witnesses at the October 23, 2006, hearing either Fettweis or former AUSA Carney. See pp. 9-10, *supra*. Other than the letter from Fettweis to the SEC, petitioner never proffered any evidence to rebut any part of the government's explanation that the prior statements were mistaken. There is consequently no basis for concluding that the district court denied petitioner an adequate opportunity to establish that Kearney had actually received immunity.

Pet. App. 14a-15a. The court reiterated its prior conclusion that "Kearney did not, as a matter of undisputed fact, receive any form of immunity." *Id.* at 14a. The district court concluded that, "because there was an innocent explanation for the supposed inconsistency that [petitioner] sought to take advantage of, the court did not abuse its discretion in ruling that the government submissions were not admissible." *Ibid.*

6. The court of appeals affirmed. Pet. App. 1a-7a. Petitioner contended, as one of eight separate challenges to his convictions set forth in his 100-page opening brief, that the district court had erred by excluding the government's prior statements about Kearney's supposed immunity agreement and by refusing to give the same jury instruction that it had given at the first two trials. See *id.* at 5a-6a. The court of appeals rejected those claims, explaining that, "[b]ecause the Government offered a sufficient explanation for the mistaken jury instruction with regard to [Kearney's] informal immunity * * * , the District Court did not abuse its discretion." *Id.* at 6a.

ARGUMENT

Petitioner contends (Pet. 12-29) that the district court erroneously excluded statements made by the government in prior trials of petitioner and that this Court's review is necessary to resolve a conflict in the circuits on whether Federal Rule of Evidence 801(d)(2), which defines "[a]dmission[s] by [a] party-opponent" as nonhearsay, applies to statements by the government in criminal prosecutions. His contentions lack merit. The district court had an ample basis for excluding the prosecutors' prior representations that a witness had an immunity agreement after the government established

that no such agreement existed and that the statements were made inadvertently. The court of appeals' unpublished decision finding no abuse of discretion in that evidentiary ruling does not merit this Court's attention. No court of appeals has addressed a comparable situation, where a district court, after a full inquiry, concluded that the prior prosecutorial statements resulted from an inadvertent mistake. Further, although courts have articulated different views about Rule 801(d)(2) in different contexts, the Second Circuit has treated prosecutors' in-court statements as encompassed within Rule 801(d)(2), and no circuit's decision would have compelled admission of the statements offered in this case, which were readily excludable under Federal Rule of Evidence 403. Given the absence of a square conflict and the harmlessness of the alleged error, further review of the court of appeals' unpublished decision is not warranted.

1. Under Federal Rule of Evidence 801(d)(2), the term "[a]dmission by party-opponent" encompasses, inter alia, a "statement [that] is offered against a party and is (A) the party's own statement, * * * (B) a statement of which the party has manifested an adoption or belief in its truth, * * * or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Rule 801(d)(2) does not render all such statements *admissible*. Rather, Rule 801(d) simply provides that a statement within the enumerated categories "is not hearsay," Fed. R. Evid. 801(d), and therefore is not subject to exclusion under Federal Rule of Evidence 802. Questions concerning the ultimate admissibility of statements encompassed by

Rule 801(d)(2) are decided by reference to other provisions of the Federal Rules of Evidence.

Petitioner argues that certain statements made by federal prosecutors during petitioner's first and second trials should have been admitted at his third trial. The government had represented in the first two trials that it had an informal immunity agreement with one of the witnesses who testified against petitioner. After concluding that the government had established as a matter of fact that no immunity agreement existed and that the earlier government acknowledgments to the contrary had an innocent explanation, *i.e.*, they were made inadvertently, the district court excluded the statements. Pet. App. 11a-13a. Contrary to petitioner's contention (Pet. 15-21), no circuit conflict exists as to whether Rule 801(d)(2) requires admission of such statements.

a. The First and District of Columbia Circuits have held that statements submitted by government attorneys to courts in criminal cases are encompassed by Rule 801(d)(2). See, *e.g.*, *United States* v. *Kattar*, 840 F.2d 118, 130-131 (1st Cir. 1988) (holding that Rule 801(d)(2) encompassed prosecutors' statements in a sentencing memorandum and a brief in prior cases); *United States* v. *Morgan*, 581 F.2d 933, 937-938 & n.10 (D.C. Cir. 1978) (holding that Rule 801(d)(2) encompassed police officer's statements in sworn affidavit that was approved by a prosecutor and submitted to a magistrate). The court in *Morgan* concluded that "the Federal Rules [of Evidence] clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases," *id.* at 937 n.10, and it found "nothing in the history of the Rules generally or in Rule 801(d)(2)(B) particularly to suggest that it does not apply to the prosecution in criminal cases," *id.* at 938. The court in *Kattar*

held that, "[w]hether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases, * * * the Justice Department certainly should be considered such." 840 F.2d at 130.

The District of Columbia and First Circuits have recognized, however, that the prior statement of a government agent may still be inadmissible on other grounds even when it is found to be non-hearsay under Rule 801(d)(2). The court in *Morgan* considered (while ultimately rejecting on the merits) the government's relevancy objection to admission of the pertinent statements. See 581 F.2d at 936-937. The court in *United States* v. *Warren*, 42 F.3d 647, 655-656 (D.C. Cir. 1994), similarly considered (and rejected on the facts) the district court's exclusion of government-agent statements under Rule 403. And the court in *Kattar* explained that, "[o]f course, this sort of party-opponent admission is still subject to the trial court's balancing of its probative value against its prejudicial effect under Rule 403." 840 F.2d at 131 n.10. Thus, neither of those courts has rejected the basis for the exclusion here, *i.e.*, the district court's finding that the factual basis of the government's prior representation was incorrect because of an inadvertent error.

b. Petitioner contends (Pet. 18-19) that the Seventh and Fifth Circuits have categorically refused to admit statements by government agents in criminal cases under Rule 801(d)(2). Petitioner, however, errs because those courts have reserved judgment on the application of Rule 801(d)(2) to statements of the type made in this case, *i.e.*, statements made by prosecutors in court proceedings.

The Seventh Circuit has held, as a *general* matter, that statements by government employees fall outside

Rule 801(d)(2)(D), based on the principle that individual government agents "are traditionally unable to bind the sovereign." *United States* v. *Kampiles*, 609 F.2d 1233, 1246 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980). See, *e.g.*, *United States* v. *Arroyo*, 406 F.3d 881, 888 (7th Cir. 2005) (holding that statements in an Internal Revenue Service memorandum were properly excluded because "government agents are not party-opponents for purposes of Rule 801(d)(2)"); *United States* v. *Prevatte*, 16 F.3d 767, 779 n.9 (7th Cir. 1994) (statements of an undercover cooperator made to his mother were properly treated as hearsay, notwithstanding Rule 801(d)(2)). The court in *Kampiles* explained that, "[p]rior to adoption of the Federal Rules of Evidence, admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule," and the court found "[n]othing in the Federal Rules of Evidence [that] suggests an intention to alter the traditional rule." 609 F.2d at 1246.

But petitioner identifies only one Seventh Circuit case—*United States* v. *Zizzo*, 120 F.3d 1338, 1351 n.4, cert. denied, 522 U.S. 998 (1997)—that involved statements made *to a court* by a government *attorney*. The court in *Zizzo* observed that, "[b]ased on the common law principle that no individual should be able to bind the sovereign, we generally decline to apply Rule 801(d)(2) to statements made by government employees in criminal cases." 120 F.3d at 1351 n.4. The court "note[d], however, that a number of courts have rejected that approach when dealing with statements made by government attorneys." *Ibid.* (citing *Kattar* and *Morgan*). The Seventh Circuit in *Zizzo* ultimately did not decide whether Rule 801(d)(2) encompasses in-court statements made by government counsel on behalf of the

United States. Rather, the court explained that, "even if [the defendant] could convince us that the statements qualified as nonhearsay under Rule 801(d)(2)(D), the [district] judge cited a number of reasons why he felt the statements should be excluded, any one of which supports his exercise of discretion." 120 F.3d at 1351-1352; see *id.* at 1352 (discussing various bases for exclusion and citing, inter alia, Federal Rule of Evidence 403). The Seventh Circuit thus refrained from deciding whether prosecutorial submissions of the type at issue here are encompassed by Rule 801(d)(2).

Petitioner is also wrong in asserting (see Pet. 18, 19) that the Fifth Circuit has treated statements by government officials as categorically outside the coverage of Rule 801(d)(2). Petitioner cites *United States* v. *Garza*, 448 F.3d 294 (5th Cir. 2006) (Pet. 19), in which the court of appeals upheld the exclusion of an extra-judicial report that was prepared by Michael Grimes, a government investigator. See *Garza*, 448 F.3d at 296, 298-299. In holding that the report fell outside the coverage of Rule 801(d)(2)(D), the Fifth Circuit explained that "[t]he results of [Grimes's] investigation were never adopted by the Department of Justice," and it concluded that "the district court did not abuse its discretion in ruling that Grimes' report could not be attributed to the Government." *Id.* at 299. The court of appeals, however, specifically noted that other circuits have held that "statements made by a *prosecutor*, rather than some other government employee, are admissible against the Government as a party admission under 801(d)(2)(D)." *Id.* at 298 n.14 (emphasis added). That statement underscores that the Fifth Circuit has not categorically resolved whether Rule 801(d)(2) is inapplicable to statements by *prosecutors*. Thus, with respect to the issue

presented in this case, both the Fifth and the Seventh Circuit have left open the applicability of Rule 801(d)(2) to statements made by federal prosecutors in criminal proceedings.

c. In *United States* v. *Yildiz*, 355 F.3d 80, 82 (2004) (per curiam), the Second Circuit itself stated that, for purposes of Rule 801(d)(2), "[t]here is good reason * * * to distinguish sworn statements submitted to a judicial officer, which the government might be said to have adopted, and those that are not submitted to a court and, consequently, not adopted" by the government. Thus, the Second Circuit has treated the government's prior "in-court statements * * * and filings" as admissible in appropriate circumstances. *Id.* at 82 (citation omitted). In *United States* v. *GAF Corp.*, 928 F.2d 1253, 1258-1262 (2d Cir. 1991), the court held that the government's prior inconsistent bill of particulars should have been admitted at the defendant's criminal trial. The court explained that, under Rule 801(d)(2)(B), "a prior inconsistent bill of particulars [may] be considered an admission by the government in an appropriate situation." *Id.* at 1260. In *United States* v. *Salerno*, 937 F.2d 797, 810-812 (2d Cir. 1991), rev'd on other grounds, 505 U.S. 317 (1992), the court held that the district court should have admitted the government's jury arguments from a prior criminal proceeding. And in *Yildiz*, the court reaffirmed its rulings in *GAF* and *Salerno*, stating that "[t]hese cases are consistent with Rule 801(d)(2)(B), which provides that a statement of which a party 'has manifested an adoption or belief in its truth' is not hearsay, and with authority that has applied that provision against the government in criminal cases." 355 F.3d at 82 (citing *Kattar* and *Morgan*). Thus, the Second Cir-

cuit *does* apply Rule 801(d)(2) to statements by prosecutors in appropriate cases.

Indeed, neither of the courts below suggested that statements by federal attorneys are categorically outside the coverage of Rule 801(d)(2). The district court held that, in light of the "innocent explanation" for the inconsistency between the government's prior filings and Kearney's testimony that he did not receive immunity, petitioner should "not be allowed to draw any inferences regarding the existence of * * * an immunity agreement when the undisputed facts establish that no such agreement exists." Pet. App. 13a; see *id.* at 14a-15a (explaining that "Kearney did not, as a matter of undisputed fact, receive any form of immunity," and that "there was an innocent explanation for the supposed inconsistency that [petitioner] sought to take advantage of"). The court of appeals similarly explained that the prior statements were properly excluded "[b]ecause the Government offered a sufficient explanation for the mistaken jury instruction with regard to [Kearney's] informal immunity." *Id.* at 6a. The clear premise of the decisions below was that the prior statements *would* have been treated as admissions if the government had failed to provide a convincing explanation for the discrepancy between its earlier statements and Kearney's testimony that he had not been immunized.

Against that background, petitioner's theory that this case implicates a circuit split on whether prosecutors' statements are covered by Rule 801(d)(2) in a criminal case is mistaken. The Second Circuit has made clear that such statements *can* be admitted under Rule 801(d)(2), and no court of appeals has categorically refused to treat such statements as admissions. There is, therefore, no justification for this Court's review on

whether Rule 801(d)(2) can encompass statements made to a court by federal prosecutors.[4]

3. Petitioner principally attacks the Second Circuit's standard (Pet. 20-24) on the theory that it establishes restrictions on admitting prior in-court submissions of counsel that other courts of appeals do not apply under Rule 801(d)(2). He observes (Pet. 20-21) that, under *United States* v. *McKeon*, 738 F.2d 26 (2d Cir. 1984), a party seeking to admit a statement made by counsel in a prior trial must establish that the inference the party "seeks to draw from the inconsistency [with the party-opponent's present position] is a fair one and that an innocent explanation for the inconsistency does not exist." *Id.* at 33. Petitioner's claim of a circuit conflict based on the application of that requirement is unfounded. The purported disagreement turns more on a formal matter of *which* rule of evidence permits courts to exclude prior statements by counsel when the admission would serve little probative purpose (but would engender considerable confusion and delay), rather than

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[4] Nor does this case present a broader issue concerning government agents that petitioner claims has divided the courts of appeals. Petitioner contends (Pet. 13) that there is a conflict among the circuits on "the more comprehensive issue of whether Rule 801(d)(2) can be invoked in criminal cases for statements by government agents generally, not just government attorneys." This case presents no occasion for considering that "more comprehensive issue," however, because the statements at issue here were contained in court submissions by government attorneys, and because the Second Circuit has expressly distinguished between in-court and out-of-court statements for purposes of Rule 801(d)(2). See *Yildiz*, 355 F.3d at 82 (noting recognition that "the government's attorneys can bind the government with their in-court statements," while "the out-of-court statements of a government informant are not admissible in a criminal trial pursuant to Rule 802(d)(2)(D) as admissions by the agent of a party opponent").

whether such evidence may be excluded. No review of that semantic disagreement is warranted, particularly where no other other court of appeals has considered the exclusion of a prosecutor's prior statement when it was shown to be an inadvertent error, and where the exclusion of the prior statements had no bearing on the outcome of the case.

a. Petitioner asserts (Pet. 13) that, in contrast to the Second Circuit's prerequisites to admitting prior "statements to the court by government attorneys," a prosecutor's statements are "admissible always" under the decisions of the District of Columbia and First Circuits. That is incorrect. While the District of Columbia and First Circuits treat such statements as non-hearsay under Rule 801(d)(2), those circuits have recognized that such statements may be excluded on other grounds, including on the ground that their potential for unfair prejudice or jury confusion substantially outweighs their probative value under Rule 403. See pp. 15-16, *supra*.

The Second Circuit's position is substantively similar. In *McKeon*, after the court reviewed the origins and general contours of Rule 801(d)(2), it expressed the view that "the evidentiary use of prior jury argument must be circumscribed in order to avoid trenching upon other important policies." 738 F.2d at 32. Petitioner describes the *McKeon* court's limitations on the admission of such evidence as a "gloss on Rule 801(d)(2)." Pet. 21. But while the court in *McKeon* held that prior statements of counsel should be excluded if they do not satisfy the announced standards for admission, the court did not identify the specific rule of evidence on which exclusion should be based. In particular, the court did not make clear whether such statements should be excluded on hearsay grounds (*i.e.*, as falling outside Rule 801(d)(2)'s

coverage) or on the basis of other evidentiary principles. And, although the Second Circuit in *McKeon* did not expressly rely on Federal Rule of Evidence 403, the concerns it described are directly relevant to a determination of admissibility under that rule.

Rule 403 vests district courts with significant discretion to take into account the sorts of considerations that the Second Circuit identified in *McKeon*. The rule states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The court in *McKeon* explained that admission of counsel's jury argument in a prior case "might consume substantial time to pursue marginal matters," 738 F.2d at 32; that "the evidentiary use of earlier arguments before the jury may lead to seemingly plausible but quite prejudicial inferences," causing the jury in the second trial to "be misled," *ibid.*; and that admission of such evidence "may lead to the disqualification of counsel," *id.* at 33. These considerations are all subsumed under Rule 403. There is no reason to assume that other circuits, considering the same factors within the context of an explicit Rule 403 balancing of interests, would apply significantly different substantive standards in determining whether particular attorney statements from prior judicial proceedings should be admitted into evidence at a subsequent trial.[5]

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[5] Petitioner contends (Pet. 25) that some courts of appeals under Rule 801(d)(2) have erroneously applied more restrictive standards for admitting prior government statements than for admitting analogous statements by private party-opponents. The Second Circuit's decisions, however, adopt no such double standard for statements by federal

b. The district court's assessment of the record in this case makes clear that Rule 403 provides ample justification for exclusion of the prior statements by prosecutors that witness Kevin Kearney had received immunity from prosecution.[6] Both in its denial of petitioner's re-

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prosecutors. *McKeon*, *supra*, the source of the Second Circuit's jurisprudence on this issue, involved (as petitioner recognizes, see Pet. 20) the admission of statements made by defense counsel in a prior criminal proceeding. See *Salerno*, 937 F.2d at 811-812 (applying *McKeon* standards to determine the admissibility of the government's jury argument in a prior case); *GAF*, 928 F.2d at 1259-1260 (relying substantially on *McKeon* in holding that a prior bill of particulars prepared and submitted by the government was admissible in a subsequent trial). And the court in *Yildiz* recognized that Rule 801(d)(2) makes "[n]o distinction between * * * the civil and criminal context, the government and other parties, or the government's attorneys and its other law enforcement agents." 355 F.3d at 81. Because the Second Circuit has applied the same standards to determine the admissibility of prior in-court statements by government and private counsel, the evidentiary ruling challenged here does not (as petitioner incorrectly suggests, see, *e.g.*, Pet. 24-25) reflect any disparate treatment of the parties in a criminal case.

[6] An appellate court "may affirm an evidentiary ruling on any ground supported by the record, regardless of whether the district court relied on the same grounds or reasoning." *United States* v. *Pang*, 362 F.3d 1187, 1192 (9th Cir.), cert. denied, 543 U.S. 943 (2004); accord *United States* v. *Ledford*, 443 F.3d 702, 707 (10th Cir. 2005), cert. denied, 127 S. Ct. 165 (2006); *United States* v. *Mussare*, 405 F.3d 161, 168 (3d Cir. 2005), cert. denied, 546 U.S. 1225 (2006). That principle applies to Rule 403. See *United States* v. *Counce*, 445 F.3d 1016, 1018-1019 (8th Cir. 2006) (per curiam) (upholding exclusion of evidence under Rule 403 after ruling that the district court had erroneously excluded the evidence on other grounds); cf. *United States* v. *Yousef*, 327 F.3d 56, 156-157 (2d Cir.) (prior jury argument that might have been admissible as admission of party-opponent under Rule 801(d)(2)(A) properly excludable as irrelevant under Rule 402), cert. denied, 540 U.S. 993 (2003). In this case, the district court's own reasoning supports exclusion under Rule 403, even if the court did not cite that rule. Notably, the court of

quest that the government's prior statements be placed before the jury, and in denying petitioner's post-verdict request for a new trial, the court referred to the "undisputed" fact that no such immunity agreement had ever existed. See Pet. App. 13a, 14a. The prosecutors' former mistaken statements that were contrary to the "undisputed" facts, concerning a matter relating to impeachment of a witness, are clearly excludable under Rule 403 to prevent "confusion of the issues," "misleading the jury," or "waste of time." Fed. R. Evid. 403.

In view of a district court's broad discretion under Rule 403, a court would indisputably have authority to exclude a party-opponent's prior statement after the party-opponent established to a virtual certainty that its earlier statement was a mistake. Suppose, for example, that a prosecutor stated that a particular witness had previously been given a reduced sentence in return for his agreement to testify, but subsequently realized that the witness had not yet been sentenced and that the prosecutor had confused him with another individual. If the error in the prior statement were made clear by relevant judicial records, and the defense nevertheless sought to introduce the prosecutor's earlier statement at a second trial, the court should clearly exclude it under Rule 403 on the ground that it would "mislead[] the jury" to suggest that any serious dispute about the matter existed. The district court's factual determination here—that the government had clearly established the non-existence of any immunity agreement—stands on a similar analytical footing. The court accepted the government's proof on that point only after affording peti-

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appeals in this case did not cite *McKeon* or any rule of evidence, but simply stated that "the District Court did not abuse its discretion." Pet. App. 6a.

tioner an ample opportunity to provide contrary evidence from any source, which petitioner was unable to do.[7] The court's exclusion of evidence that would only fuel factually unsupported implications that petitioner would have drawn from mistaken prior government statements was well within its discretion, and its decision to exclude that evidence creates no conflict with any other decision.[8]

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[7] Petitioner contends (Pet. 10 n.8) that the factual issue of whether Kearney had an informal immunity agreement was "hotly disputed," but that claim lacks any factual basis. At the third trial, Kearney testified unequivocally that he had not been promised anything by the government in exchange for his testimony. C.A. App. 8296-8297, 8348-8350, 8355-8356, 9616-9617. The government also informed the district court that each of the former prosecutors had "confirmed that, not only did they not offer Kearney immunity against prosecution in this case at any time, but they never offered and would not * * * have offered any witness 'informal immunity' by way of an oral representation." *Id.* at 1786, 2149. The government further explained that Kearney's counsel had confirmed that he had never entered into any kind of immunity agreement with the government on behalf of Kearney. *Id.* at 2148, 7016, 7021; see pp. 8, 10, 11, *supra*. And petitioner declined to avail himself of ample opportunities to offer evidence substantiating his claim that an immunity agreement existed. See pp. 10-11, *supra*.

[8] The circumstances of this case are far removed from the facts of *United States* v. *Powers*, 467 F.2d 1089 (7th Cir. 1972), cert. denied, 410 U.S. 983 (1973), in which then-Judge Stevens dissented from the court of appeals' decision to uphold the exclusion of evidence of a prior position taken by the government. *Id.* at 1097-1098 (Stevens, J., dissenting). In that case, the government prosecuted Powers, an attorney, for fraud. It introduced evidence that Powers had received certain checks that linked him to a fraudulent scheme with his client, Fidanzi. The defense contended that, in a prior prosecution of Fidanzi, the government had made the contradictory factual claim, supported by the same witness, that the checks at issue were personally and exclusively received by Fidanzi. On those facts, then-Judge Stevens believed that Powers was entitled to prove that the government had previously taken

c. In any event, petitioner is mistaken in suggesting (Pet. 14-15) that his inability to introduce the government's prior statements about an informal immunity agreement with Kearney tipped the balance towards conviction after two prior mistrials. To the contrary, any error in excluding the prosecutors' misstatements at issue was harmless. See *United States* v. *Warren*, 42 F.3d at 656 (finding that error in excluding officer's statement under Rules 801(d)(2) and 403 did not require reversal because the court concluded "with fair assurance . . . that the judgment was not substantially swayed by the error") (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946)). Kearney's testimony spanned roughly 130 pages of the several-thousand-page-long trial transcript. C.A. App. 8240-8362, 9614-9623. During that testimony, Kearney admitted that he had participated in the fraud yet had not been charged with any crime; Kearney also admitted that he did not know whether petitioner had participated in the fraud. *Id.* at 8254-8255, 8293-8297, 8302-8322, 8338-8339, 8348-8350, 8355-8356, 8361-8362. In addition, Kearney admitted that he was told that he "was not a target of the investigation," which was "very good news" to him. *Id.* at 8348-8350.

Thus, the fact that Kearney had not been prosecuted and might therefore be biased was plain to the jury. Petitioner employed other means to discredit Kearney as well: he called a former prosecutor and an SEC lawyer

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"mutually exclusive" positions on an issue central to factual guilt. *Ibid.* That situation bears scant resemblance to the circumstances here, where the government's factual theory of petitioner's guilt was consistent through all three trials, and the only change in its position was a realization that the prosecutors' concession of an immunity agreement with a witness was factually unfounded.

to describe for the jury interviews with Kearney before the first trial, during which interviews Kearney purportedly did not mention certain events or contradicted his testimony at the third trial. C.A. App. 10278-10286, 10293-10298. Given the thorough impeachment of Kearney, the excluded misstatements concerning the purported immunity agreement would not have had any significant incremental impact on the jury, particularly when they would have been refuted by the uniformly contrary testimony of Kearney, Kearney's counsel, and the prosecutors involved.

Nor was Kearney's testimony the critical evidence against petitioner. Cosmo Corigliano—CUC's CFO and petitioner's co-conspirator—described in detail how the fraud worked and directly implicated petitioner with respect to both the perpetration and the concealment of the fraud. C.A. App. 9114-9119, 9122-9133, 9135-9182, 9188-9199, 9202-9209, 9213-9214, 9219-9223, 9226-9229, 9231-9236, 9961, 9972-9976. Anne Pember—CUC's controller and petitioner's co-conspirator—similarly detailed the fraud. *Id.* at 8396, 8401-8416, 8428, 8431-8449, 8453-8469, 8516-8517, 8519-8520, 8523-8525, 8528-8529, 8532-8535, 8540. Henry Silverman—Cendant's CEO—described petitioner's extraordinary efforts both to keep Pember in a position that would allow her to continue concealing the fraud, and to continue using CUC's outside auditor, Ernst & Young, which had missed red flags signaling the fraud. *Id.* at 8742-8775. Importantly, Silverman was a *new* witness at petitioner's third trial, and his testimony was far more likely to explain the different outcome at that trial than the omission of a prior statement by a prosecutor that Kearney had immunity (which statement Kearney denied without impeachment from any witness with factual knowledge). Michael Mo-

naco—the Cendant CFO whom defense counsel called honest (*id.* at 7569)—corroborated Silverman's testimony concerning petitioner's lobbying on behalf of Pember and Ernst & Young. *Id.* at 7787-7788, 7847-7884, 7888-7889, 8175-8176, 8187-8188. Jan Davidson—a former CUC director—described petitioner's stern reaction when questioned at a board meeting about CUC's merger reserves—a key part of the fraud. *Id.* at 7653-7662. Casper Sabatino, a CUC vice president and defense witness, testified that he had exposed the fraud to Cendant officials, rather than to petitioner, because he feared that otherwise his concerns would be "squashed." *Id.* at 10454-10455. Another defense witness, Greg Danilow—petitioner's lawyer and friend—helped to establish that petitioner had transferred $17 million in assets when he learned that a criminal investigation was underway, and that petitioner had perjured himself in both prior trials. *Id.* at 9066-9072; see *id.* at 1695-1696, 9031-9052, 12042-12045.

In light of the thorough impeachment of Kearney, including by evidence from which the jury could conclude that he had a reason to be biased in favor of the government because he had not been prosecuted, and in light of the strength of the evidence from other witnesses of petitioner's fraud, any error in excluding the prosecutors' prior (mistaken) statements about an immunity agreement did not have "substantial and injurious effect or influence in determining the jury's verdict the verdict," *Kotteakos*, 328 U.S. at 776, and the court of appeals' unpublished decision does not warrant review.

5. Finally, petitioner contends (Pet. 30-33) that the exclusion of the government's prior statements in this case violated his rights under the Fifth and Sixth Amendments. That claim, which essentially recasts his

evidentiary objection, lacks merit. The Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)), including the right to present evidence that a witness has been promised immunity so that the jury may assess the witness's credibility, see *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972). Here, Kearney testified at the third trial and denied that he had been promised anything by the government in exchange for his testimony. C.A. App. 8296-8297, 8355-8356, 9616-9617. Petitioner had the opportunity to cross-examine him fully, as well as the opportunity to elicit testimony from the pertinent AUSAs and Kearney's counsel, all of whom either testified or were under defense subpoena, *id.* at 9002-9004, 9311-9313, 9316-9323, 9484-9485, 10164-10186, 10428-10429.

Petitioner sought to introduce the government's mistaken statements from the two prior trials to create the appearance of a genuine factual issue on a matter that, in the district court's view, was not the subject of any legitimate dispute. The Constitution did not require the court to admit evidence of a purported immunity agreement "when the undisputed facts establish[ed] that no such agreement exist[ed]." Pet. App. 13a. See *Holmes* v. *South Carolina*, 547 U.S. 319, 326 (2006) ("[W]ell-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury."); *United States* v. *Nobles*, 422 U.S. 225, 241 (1975) ("[O]ne cannot invoke the Sixth Amendment as a justification for presenting

what might have been a half-truth.").[9] Because the district court properly concluded that the government's prior statements lacked probative force, and because the exclusion of those statements for impeachment purposes responded to wholly legitimate evidentiary interests—*e.g.*, the concern about jury confusion, minitrials on a collateral matter, and the potential to mislead the jury—the district court's evidentiary ruling infringed no constitutional right of petitioner to present his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

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[9] In *Holmes*, the Court found constitutional error because the trial court excluded defense evidence suggesting a third party's guilt based on the conclusion that the prosecution's evidence was strong, "without considering challenges to the reliability of the prosecution's evidence." 547 U.S. at 330. The error was that "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 331. Here, in contrast, the district court considered all the relevant evidence and concluded that petitioner had failed to call into question the government's innocent explanation of its former error, despite a full opportunity to adduce evidence of an immunity agreement with Kearney, if such evidence existed.

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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A. The Circuit Conflict Is Extraordinary.

Surely it is not common for a case to reach this Court in which the division among the lower courts is more clear, more entrenched, and so widely pointed out by courts and commentators. Even the government acknowledges grudgingly that "courts have articulated different views of Rule 801(d)(2) in different contexts." Br. 14.[1]

[1] The government's brief does not discuss its recognitions of the conflict in other courts. See Pet. 29. "Br." refers to Brief in Opposition; "Pet.," Petition; "PCA," Petition's appendix; "CAA," Court of Appeals appendix; "Ad.," addenda hereto.

1. The government stresses that no prior Rule 801(d)(2) decision excluded prosecutorial admissions on the ground "they were made inadvertently," Br. 15—as the Second Circuit did here, applying its "innocent explanation" exception to the Rule. The Second Circuit, the government maintains, nevertheless would allow government admissions in evidence "in appropriate circumstances." Br. 19. But the government does not deny that in the Second Circuit (and, it fails to note, the Fourth and Eleventh also) "appropriate circumstances" for admissibility under the Rule vanish if the government interposes an "innocent explanation"—here, its claim that on at least five occasions prosecutors made an "inadvertent" written "mistake." Br. 14. Nor can the government deny that in the First, Sixth, Eighth, Ninth and District of Columbia Circuits, such evidence is admissible. In those circuits the evidence comes in, and any arguments to disbelieve it because of claims of innocent mistake must be presented to the jury.

2. The government questions whether the widely-cited Second Circuit decision on which the District Court relied, *United States* v. *McKeon*, 738 F.2d 26 (2d Cir. 1984), really concerned Rule 801(d)(2). Br. 22. No one else shares that doubt. The *McKeon* opinion explicitly reviewed whether a statement was "an admission under Rule 801(d)(2)." 738 F.2d at 29. The Second Circuit subsequently described *McKeon* as the basis for holding a government attorney's statements "not admissible under Rule 801(d)(2)(D)." *United States* v. *Ford*, 435 F.3d 204, 215 (2d Cir. 2006). The Eleventh Circuit adopted *McKeon* as its own position in determining "admissib[ility] under Rule 801(d)(2)." *United States* v. *DeLoach*, 34 F.3d 1001, 1005 (11th Cir. 1994). These cases were cited

in the petition, but are unmentioned in the brief in opposition.

3. Also wholly ignored are the numerous state-court decisions, Pet. 28, that replicate the federal division, on which they comment. That list grew on February 14, when the highest court of Maryland expressed dismay that "[s]ince the adoption of the Federal Rules, the federal circuits have drifted apart in their interpretation of Rule 801," leaving a "jurisprudential gully" with "federal circuits . . . distributed between . . . two poles," and "[t]he States and the District of Columbia are split as well." *Bellamy* v. *State*, 941 A.2d 1107, 1115-16 (Md. 2008). What that court calls a "difficult and fractured" conflict in interpreting a single text, *id.* at 1115 n.16, the government shrugs off as "semantic disagreement." Br. 22.

4. The circuit split is not simply, as the government attempts to revise it, whether "statements by federal attorneys are *categorically* outside the coverage of Rule 801(d)(2)," Br. 20 (emphasis supplied)—even though the Seventh and Fifth Circuits indeed have excluded admissions by government agents as a class. Pet. 18-19.[2] What matters for

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[2]"[T]he Seventh Circuit has held that the party admission rule should not be applied against the government in criminal cases . . . ." *Harris* v. *United States*, 834 A.2d 106, 120 (D.C. 2003). The government speculates that the Seventh Circuit some day might change its mind for "statements made to a court by a government *attorney*," Br. 17 (emphasis in original), because that court acknowledged its conflict with the First and D.C. Circuits in *United States* v. *Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997). *But see United States* v. *Prevatte*, 16 F.3d 767, 779 n.9 (7th Cir. 1994) (in spite of circuit conflict, "[w]e see no reason to disturb this longstanding rule."). Similarly, because

certiorari is that the Second Circuit and those that follow it exclude such admissions if the government offers an "innocent explanation," *McKeon*, 738 F.2d at 33—while five other Circuits hold such statements to be admissible under Rule 801(d)(2) without any such judge-made exception. Pet. 15-17.

5. Nowhere in its brief does the government attempt to defend as correct the Second Circuit's elaborate revision of Rule 801(d)(2)—what one court calls *McKeon*'s "five policy considerations, in addition to the three-part test," *Bellamy*, 941 A.2d at 1115 n.16—which does not even pretend to be based on text or legislative history.[3]

B. The Exclusion Applied Rule 801(d)(2).

In this Court the government argues for the very first time that these admissions "were readily excludable under Fed. Rule of Evidence 403," Br. 14, which it incorrectly implies was "the basis of the exclusion here," Br. 16. Two glaring flaws expose that sleight-of-hand: First, both courts below ruled only under Rule 801(d)(2), the District Court explicitly, and neither they, nor the government, ever

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the Fifth Circuit in holding Rule 801(d)(2) inapplicable to a government investigator noted its conflict with other circuits, the government perceives that "the Fifth Circuit has not categorically resolved whether Rule 801(d)(2) is inapplicable to statements by *prosecutors*." Br. 18 (emphasis in original), citing *United States* v. *Garza*, 448 F.3d 296, 298 n.14 (2006).

[3] *United States* v. *Yildiz*, 355 F.3d 80 (2d Cir. 2004), cited Br. 21 n.4, "reaffirm[s]" the Second Circuit's atextual approach to Rule 801(d)(2) "in light of legal developments that have led some courts and commentators to question its validity." *Id.* at 81, citing, *inter alia*, *United States* v. *Morgan*, 581 F.2d 933 (D.C. Cir. 1978).

so much as mentioned Rule 403. Second, the government's prior statements could not even colorably have been excluded under Rule 403.

(a) The District Court explicitly stated that it was "excluding as admissions under Rule 801(d)(2)," PCA 14a, applying *McKeon*'s "innocent explanation" test, PCA 11a, 13a, 15a.[4] The Second Circuit agreed that by claiming to have been "mistaken," "the Government offered a sufficient explanation." PCA 6a. The District Court never purported to engage in the weighing of probative value against potential unfair prejudice, delay or confusion that Rule 403 would have required.[5] And not once in the District Court, and not once in the Court of Appeals, did the government so much as whisper Rule 403.

(b) Had the District Court invoked Rule 403 to exclude from the jury written evidence of the immunizing of a significant prosecution witness, such exclusion would have been not only an abuse of discretion, but a constitutional violation as well. The government does not identify a single case in which otherwise-admissible evidence of witness immunity has been excluded under Rule 403.

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[4] The government argues that in *McKeon* the Second Circuit "did not identify the specific rule of evidence on which exclusion should be based." Br. 22. But no court or commentator has ever read *McKeon* other than as a Rule 801(d)(2) holding. And the government concedes that "*McKeon* did not expressly"—nor in any other way—"rely on Federal Rule of Evidence 403." Br. 23.

[5] Nor did the Second Circuit. This Court recently reminded that an appellate court may not in the first instance perform a Rule 403 balancing. *Sprint/United Management Co.* v. *Mendelsohn*, 128 S. Ct. 1140, 1146 (2008).

C. The Government Fails To Address the Constitutional Violation.

The government lightly dismisses petitioner's Fifth and Sixth Amendment right to present evidence of a witness's bias as "essentially recast[ing] his evidentiary objection." Br. Opp. 29-30. It is more than that. Excluding evidence showing immunity granted to an important prosecution witness takes this case well beyond any ordinary application of Fed. R. Evid. 801(d)(2). This Court has held, going back to *Giglio* v. *United States*, 405 U.S. 150 (1972), that failure to permit the jury to be informed of a prosecutor's grant of immunity to a prosecution witness denies due process, even when—*as in Giglio itself*—government attorneys have later denied that they granted immunity and offered "differing versions of the events." *Id.* at 153. "[T]he true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." *Holmes* v. *South Carolina*, 547 U.S. 319, 330 (2006). "[T]he fact of the inconsistency may properly be brought to the attention of the jury and the government put to the burden of explaining . . . ." *United States* v. *Powers*, 467 F.2d 1089, 1097 (7th Cir. 1972) (Stevens, J., dissenting), *cert. denied*, 410 U.S. 983 (1973) (cited with approval in, *e.g.*, *United States* v. *Kattar*, 840 F.2d 118, 131 (1st Cir. 1988)). The government was free to argue *to the jury* that its prior statements acknowledging immunity should not be believed. But petitioner was constitutionally entitled to show them to the jury, and to argue the opposite.

To exclude the government's five prior written admissions, the new prosecutors offered the new judge nothing more than Kearney's sudden denial of

immunity, and unsworn hearsay representations concerning Kearney's 15 to 20 meetings with previous prosecutors beginning eight years earlier. CAA 4742-44, 8297. A prosecutor's "remarks [are] not evidence." *United States* v. *Cutchin*, 956 F.2d 1216, 1218 (D.C. Cir. 1992). In *Giglio* the government, seeking to block evidence of a promise to a witness, at least presented sworn statements of "two assistants in their affidavits," 405 U.S. at 153; this Court through Chief Justice Burger nevertheless held that

> "evidence of any understanding or agreement would be relevant to his credibility and the jury was entitled to know of it."

Id. at 155.

D. The Government's Descriptions of This Record Are Not Reliable.

1. ***The Two-Year, Two-Trial, Five-Times "Mistake."***—The government now describes its two years of prior admissions as "an inadvertent mistake," Br. 14, as if what it formerly called "a slew of Government briefs and pleadings," CAA 2144, had been some one-time slip of the tongue. Instead of addressing this record, it conjures an imaginary prosecutor who referred to a witness but "had confused him with another individual," then "established to a virtual certainty that its earlier statement was a mistake," as was "made clear by relevant judicial records." Br. 25.

Not so here. The statements were made in court at least five times over two years. The "relevant judicial records" reveal the former prosecutors not only proposing an instruction on Kearney's immunity themselves, Ad. 4a, 6a, but making line-by-line edits to fine-tune the immunity instruction, Ad. 2a, 9a, and

filing a detailed legal memorandum acknowledging that, in the government's words,

> "a witness such as Kearney who is testifying pursuant to an informal immunity agreement *does* have a motivation to testify favorably for the Government . . . ."

Ad. 12a (emphasis in original). The prior judge confirmed with the government in open court that the jury would be instructed that Kearney had received immunity, and "[j]ust so we're clear, it's informal immunity of government witness and it's only about Kevin Kearney." Ad. 21a.

2. ***The Non-Existent Rule 104 Hearing.***—In this Court for the first time the government invents the tale (never mentioned in its brief below) that the District Court prior to its exclusion order conducted "a full inquiry," Br. 14, "a hearing pursuant to Federal Rule of Evidence 104," *id.* 10, leading to a "finding," *id.* 16. It complains that at "the Rule 104 hearing," "petitioner did not seek to present evidence on the issue of Kearney's proposed immunity." *Id.* 10.

There was no Rule 104 hearing. Ironically, petitioner twice had requested that one be held before any ruling to exclude the admissions,[6] but the District Court did not do so. What the Brief in

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[6] Petitioner had requested that "[a]t a minimum, the Court should conduct an evidentiary hearing . . . and permit inquiry of *all* of the prosecutors who interacted with Mr. Kearney and/or his counsel," C.A.A. 1730 (emphasis in original), "something that should be gone into before trial in an appropriate hearing where the proper witnesses and documents can be brought before the Court," *id.* at 7067-68.

Opposition now calls "the Rule 104 hearing," Br. 10, citing CAA 10105-10229, had nothing remotely to do with Kearney's immunity; it concerned only whether specified SEC and other government employees would testify reading notes of their witness interviews. Petitioner in his new-trial motion "renew[ed] his request for an evidentiary hearing on the subject of the statements and promises made to Mr. Kearney by the government between 1998 and 2004." Mot. 7. Neither the government in opposing that motion, nor the court in denying it, ever suggested that such a hearing already had taken place.

3. ***Inverted Burden.***—The government pretends that petitioner had to meet some additional burden before showing the jury evidence already declared admissible by the Federal Rules of Evidence. The government argues that "Rule 801(d) simply provides that a statement within the enumerated categories 'is not hearsay' . . . ." Br. 14. But Rule 402 provides that

> "[a]ll relevant evidence is admissible, except as otherwise provided"

by Constitution, law or rule. The statements by the government that Kearney had received immunity were unquestionably relevant. Fed. R. Evid. 401; *Giglio*, *supra*.

Although he had no obligation under Rule 801(d)(2) to corroborate further the government's five written admissions of informal immunity (which of course corroborated each other), petitioner pointed out that Kearney's counsel had described Kearney's "cooperation . . . rewarded by the U.S. Attorney's Office in its decision not to prosecute Kearney," as part of "*its own agreement with Kearney*." Ad. 15a-16a

(emphasis supplied). The government responded with yet another hearsay representation, that the letter's author six years later considered its wording "unfortunate." CAA Supp. 16.[7]

The government also quotes repeatedly the District Court's unexplained comment that the government's third-trial denial Kearney had immunity was "undisputed," even though "a slew of government briefs and pleadings," CAA 2144, certainly disputed it. PCA 13a; Br. I, 12, 13, 25. The government had told the court, "I don't think there's any dispute that there's no "*written* immunity agreement." Ad. 24a (emphasis supplied). But petitioner pointed out that "The issue is the existence of an agreement. It could be oral as well as written." Ad. 23a. Petitioner reiterated that "Our position is that . . . the government agreed not to prosecute him." Ad. 25a.

4. ***Crucial Error***.—The government now asserts—it did not do so in either court below—"the harmlessness of the alleged error." Br. 14.

(a) This newly-minted harmless-error argument could scarcely find a less appropriate vehicle. Here is a petitioner whom one jury declined to convict; a second jury also declined to convict; and a third jury, with a new judge, acquitted of one out of four charges. The government told the jury, "the question in dispute is this, simply put, whether the defendant knew about the fraud." CAA 10926. There was not a single document to tie petitioner to any violation, and

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[7] The government's contention that absence of immunity somehow was "corroborated" by a former official of the Connecticut Board of Accountancy, Br. 9, is unfathomable; he testified simply that "I was never told about any agreement by the U.S. Attorney or anybody else for that matter." CAA 9628.

only one prosecution witness who claimed direct knowledge of petitioner's having any role in misconduct. The government's case rested upon the testimony of that heavily-impeached[8] government witness, Corigliano, and thus depended upon his credibility. Kearney, in turn, was the only witness who corroborated the key part of Corigliano's testimony. Hence Kearney's own credibility was crucial.

It was not until the third trial, in which the new judge excluded any mention or evidence of Kearney's immunity, that the government was able to present Kearney as a wholly disinterested witness. For the third trial, the government moved Kearney to center stage, featuring him prominently in the prosecutors' closing arguments to the jury. See Pet. 10-11.

(b) The government now argues that the evidence of Kearney's immunity, which it fought so hard to keep from the jury in the third trial, really did not matter, because the jury probably caught on, anyway. "[T]he fact that Kearney had not been prosecuted and might therefore be biased was plain to the jury." Br. 27; see also *id.* 29. But, as the government itself previously pointed out, not having been prosecuted is different from having received a promise of immunity from the government. Ad. 24a-25a. And for any jurors not so sophisticated as the government imagines, petitioner's counsel had been specifically prohibited by the court from using the evidence of Kearney's immunity to connect the dots for them.[9]

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[8] See Pet. 3-4 n.4.

[9] "Mr. Forbes shall not be allowed to draw any inferences regarding the existence of an immunity agreement." PCA 13a.

E. The Record Is Focused.

This record frames the admissibility issue with stark clarity. The excluded statements were made:

—by the government's attorneys, not ordinary employees.

—in writing.

—in court.

—in the same prosecution.

—repeatedly.

—not as argument or opinion, but as to facts.

By its nature, informal immunity "encourages prosecutors to 'fly below the radar screen' in their offers of leniency to cooperating defendants." Cassidy, "*Soft Words of Hope*," 98 NW. U.L. REV. 1129, 1177 (2004). The original prosecutors frankly acknowledged Kearney's immunity, but failed to convict. The third-trial prosecutors erased those acknowledgments, and finally succeeded.

The Second Circuit here holds that the government, although it has at least *five times admitted* in writing making an immunity promise, later may simply assert "inadvertence," Ad. 24a, and press the "delete" key. Petitioner would have been permitted to bring those admissions to the attention of the jury if he had been tried in any of at least five other federal circuits. Which circuits are correct is an open issue this Court should now settle.

CONCLUSION

For the reasons stated herein and previously, certiorari should be granted.

Respectfully submitted,

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April 29, 2008

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ADDENDA

ADDENDUM 1

Government's First Admission (Oct. 8, 2004)*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed JUN 30, 2004]

No. 3:02CR264 (AWT)

UNITED STATES OF AMERICA,

v.

WALTER A. FORBES and E. KIRK SHELTON.

PRELIMINARY PROPOSED JURY INSTRUCTIONS OF WALTER FORBES

* * *

PROPOSED JURY INSTRUCTION NO. 18
(Informal Immunity of Government Witness)

You have heard the testimony of witnesses Kevin Kearney, Steven Speaks, Mary Sattler, and [ ], who have been promised by the government that, in exchange for their testimony, they will not be prosecuted for any crimes they may have admitted either here in court or in interviews with the government. This promise was not a formal order of immunity by the Court, but was arranged directly between the witnesses and the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed

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* C.A.A. 2127-28, 2130-31.

that you may convict a defendant on the basis of such a witness's testimony alone, if you find that his or her testimony proves every element of the offense charged beyond a reasonable doubt.

However, the testimony of a witness who has been premised that he or she will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt on the defendants in order to further the witness's own interests. Such a witness, confronted with the realization that he or she can win freedom by helping to convict another, has a motive to falsify his or her testimony.

Such testimony should be received by you with suspicion. You may give it such weight, if any, as you believe it deserves.

* * *

October 8, 2004

* * *

UNITED STATES' RESPONSE TO PRELIMINARY PROPOSED JURY INSTRUCTIONS, SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS AND SECOND SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS OF WALTER FORBES AND SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS OF E. KIRK SHELTON

* * *

18 The Government joins in Forbes' request (after removal of the name Mary Sattler) and asks that this instruction be given immediately after Forbes' Proposed Instruction No. 17.

* * *

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ADDENDUM 2

Government's Second Admission (Oct. 24, 2005)*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:02CR00264 (AWT)
HON. ALVIN W. THOMPSON, USDJ

UNITED STATES OF AMERICA

v.

WALTER A. FORBES

UNITED STATES' PRELIMINARY REQUESTS TO CHARGE FOR RETRIAL

* * *

United States v. Walter Forbes, No. 3:02cr00264 (AWT) Government's Preliminary Proposed Final Instructions for Retrial October 24, 2005

Request No. 59

Informal Immunity of Government Witness

You have heard the testimony of witnesses Kevin Kearney and Steven Speaks, who have been promised by the government that, in exchange for their testimony, they will not be prosecuted for any crimes they may have admitted either here in court or in interviews with the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people

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* C.A.A. 395-96.

to whom these promises are given. You are instructed that you may convict Mr. Forbes on the basis of such a witness's testimony alone, if you find that his testimony proves every element of the offense charged beyond a reasonable doubt.

However, the testimony of a witness who has been promised that he will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt on Mr. Forbes in order to further the witness's own interests. Such a witness, confronted with the realization that he or she can win freedom by helping to convict another, has a motive to falsify his testimony.

Such testimony should be received by you with suspicion, and you may give it such weight, if any, as you believe it deserves.

* * *

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October 24, 2005
Hartford, Connecticut

ADDENDUM 3

Government's Third Admission (Nov. 15, 2005)*

[On November 15, 2005, the government attorneys filed again the same requested jury instruction 59, entitled "Informal Immunity of Government Witness," that the government had filed October 24, 2005, pp. 4a-5a, *supra*.]

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* C.A.A. 2135.

ADDENDUM 4

Government's Fourth Admission (Nov. 20, 2005)*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:02CR264 (AWT)
November 15, 2005

UNITED STATES OF AMERICA

v.

WALTER A. FORBES

PRELIMINARY PROPOSED JURY INSTRUCTIONS OF WALTER FORBES

PROPOSED JURY INSTRUCTION NO. 18

(Informal Immunity of Government Witness)

You have heard the testimony of government witness Kevin Kearney, who has been promised by the government that, in exchange for his testimony, he will not be prosecuted for any crimes he may have admitted either here in court or in interviews with the government. This promise was not a formal order of immunity by the Court, but was arranged directly between the witness and the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed that you may convict a defendant on the basis of such a witness's testimony alone, if you find that his or her

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* C.A.A. 402-04, 2137, 2139.

testimony proves every element of the offense charged beyond a reasonable doubt.

However, the testimony of a witness who has been promised that he or she will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt on Mr. Forbes in order to further the witness's own interests. Such a witness, confronted with the realization that he or she can win freedom by helping to convict another, has a motive to falsify his or her testimony.

Such testimony should be received by you with suspicion. You may give it such weight, if any, as you believe it deserves.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:02CR00264 (AWT)
November 20, 2005

UNITED STATES OF AMERICA,

v.

WALTER A. FORBES

UNITED STATES' RESPONSE TO PRELIMINARY PROPOSED JURY INSTRUCTIONS OF WALTER FORBES

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* * *

Forbes' Proposed Instruction	Government's response

* * *

18	This instruction appears to be substantially similar to the Government's Preliminary Request to Charge for Retrial No. 59. The Government has no objection to either version being given, but Mr. Speaks' name should be omitted if the Government's version is given, because he did not testify during the retrial.

* * *

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ADDENDUM 5

Government's Fifth Admission (Dec. 12, 2005)*

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:02CR264 (AWT)
December 5, 2005

UNITED STATES OF AMERICA

v.

WALTER A. FORBES

MOTION OF WALTER FORBES (1) TO STRIKE IMPROPER REBUTTAL ARGUMENT BY GOVERNMENT AND (2) FOR A CURATIVE INSTRUCTION AND NOTICE OF CONTINUING WALLACH OBJECTION

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* * *

3. The government argued that Kevin Kearney has no motivation to lie and suggested that Mr. Kearney's testimony should be evaluated as that of an ordinary witness. *See* Tr. 3573 ("Well, Kevin Kearney didn't plead guilty to a crime. He does not have a plea agreement with the United States. His testimony had no bearing whatsoever on his SEC settlement made years ago. Does he have a motivation beyond that of an ordinary witness?"). This argument was improper in two respects. First, the government either knows or

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* C.A.A. 726-28, 759-62 (bracketed material in original).

should know that Kevin Kearney is *not* an ordinary witness because he has received informal immunity from the government, which did not prosecute him for his crimes in exchange for his cooperation. The Court will give the jury an instruction to that effect (*see* Instruction No. IV(R)), and the government itself requested such an instruction in its proposed jury instructions. It is entirely improper for the government to suggest to the jury that Kevin Kearney is a disinterested witness with no motive to falsify his testimony in favor of the government when the government knows that precisely the opposite is true. Second, the government improperly argued that Mr. Kearney's testimony had no bearing at all on his SEC settlement. There is no evidence in the record on this point, and the government's argument lacks any factual basis.

* * *

December 12, 2005

* * *

GOVERNMENT'S OPPOSITION TO DEFENDANT WALTER A. FORBES' MOTION (1) TO STRIKE ALLEGEDLY IMPROPER REBUTTAL ARGUMENT BY THE GOVERNMENT AND (2) FOR A CURATIVE INSTRUCTION AND NOTICE OF CONTINUING *WALLACH* OBJECTION

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* * *

3. Contrary to Forbes' contention, the Government never argued that Kevin Kearney had no motivation to lie. Rather, the Government accurately pointed out that Kearney was not testifying pursuant to a cooperating plea agreement, and asked the

rhetorical question, "does he have a motivation beyond that of an ordinary witness?" Tr. 3573. The purpose of the question was to contrast the motivation of a witness who has already received the benefit of an informal immunity agreement at the time of his testimony, and the very different motivation of a witness who has yet to receive the full benefit of a cooperation agreement at the time of his testimony because that witness has not yet been sentenced. *See United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir. 1996) (where "the defendants' lawyers specifically attacked [the witness's] credibility and veracity in their summations," the prosecutor permissibly "asked the jurors to draw inferences based on their common sense that would lead to the conclusion that the witness"); *United States v. Feliciano*, 223 F.3d 102, 123 (2d Cir. 2000)(prosecutor permissibly "referred the jury to evidence at trial concerning [the prosecution witnesses], on the basis of which the jury could judge whether either witness had a motivation to lie").

After the challenged remark was made during the rebuttal, the Court instructed the jury that a witness such as Kearney who is testifying pursuant to an informal immunity agreement *does* have a motivation to testify favorably for the Government that is different from that of an "ordinary witness." Tr 3811-12. Accordingly, the Government's rhetorical question was answered in the affirmative by the Court, and no further curative instruction is necessary. In any event, because this Court "properly advised the jury that the arguments of counsel were not to be taken as evidence in the case . . . . that was adequate prophylaxis against the danger of the jury's finding the informant to be credible only because of the prosecutor's reply summation." *United States v.*

Suarez, 588 F.2d 352, 355 (2d Cir. 1978) (rejecting a claim that the Government's rebuttal summation was lacking in evidentiary support).

* * *

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court deny Forbes' motion to strike portions of the Government's rebuttal argument or for a curative instruction.

Respectfully submitted,

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Special Attorney
U.S. Department of Justice

/s/ Norman Gross / de
/s/ Michael Martinez / de
By: NORMAN GROSS
MICHAEL MARTINEZ
CRAIG CARPENITO
Special Attorneys
U.S. Department of Justice

Dated: December 12, 2005
Hartford, Connecticut

ADDENDUM 6

Kearney's Counsel's Letter to SEC (May 5, 2000)*

Law Offices of
Roth & Fettweis, LLC
744 Broad Street Suite 701
Newark, New Jersey 07102
TELEPHONE: (973) 585-9495

May 5, 2000

Via Fax and Overnight Delivery

Richard H. Walker, Director
Division of Enforcement
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: In the Matter of Cendant Corporation and Trading in Its Securities - File No. HO-3401 Kevin T. Kearney

Dear Mr. Walker:

Please accept this letter in lieu of a more formal Wells Submission on behalf of Kevin T. Kearney.

* * *

D. *The Staff's Recommendation Completely and Improperly Ignores the Cooperation that Kearney Has to Date Rendered to the Commission.*

Throughout the negotiations on a possible settlement of the Commission's claim against Kearney, the Staff has steadfastly maintained that its proposals do not and should not take into account Kearney's

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* C.A.A. 1743-1751.

cooperation with the Government's investigation. That cooperation, the Staff has maintained, has been rewarded by the U.S. Attorney's Office in its decision not to prosecute Kearney. The Staff therefore has insisted that, despite Kearney's valuable cooperation, it is nevertheless appropriate for the commission to seek devastating civil penalties from him.

The Staff's position is indefensible both as a matter of law and as a matter of policy. In determining whether to impose civil penalties, a Court would look, among other things, to a defendant's cooperation both in the litigation and settlement phases of a case as "a factor to be considered with all other relevant factors." *Securities and Exchange Commission v. Custable*, 1995 W.L. 117935, *6 (N.D. Ill. March 15, 1995). The Commission, in formulating its settlement policy in this case, should apply the law; it should. give due deference to the nature and extend [*sic*] of Kearney's cooperation in this case.

Kearney has, from the outset, provided important cooperation not just to the U.S. Attorney's office, but to the Commission as well. When Kearney began his cooperation with the U.S. Attorney's Office in August 1998, the Staff specifically solicited his simultaneous cooperation with the Commission. Thus, as early as August 24, 1998 debriefing session at the U.S. Attorney's Office in Newark, two representatives of the Staff were in attendance, with Kearney's specific consent. From that day until this one, the U.S. Attorney's meetings with Kearney have always been attended by members of the Staff as well. In the course of these debriefing sessions, Kearney has provided to the Staff significant information that, without a doubt, has substantially assisted the Commission in preparing its case against more culpable

violators. Now, having obtained the benefit of two years worth of cooperation from Kearney, the Staff somehow thinks it would be fair to ignore that cooperation in assessing penalties against him.

It should be noted, moreover, that at no time did the U.S. Attorney's Office condition its own agreement with Kearney upon his simultaneous willingness to cooperate with the Commission. Both Staff personnel and U.S. Attorney's Office representatives made it clear to Kearney that his decision about whether to cooperate with the Commission would be independent of his cooperation with the criminal prosecutors. His status as a non-target in the criminal investigation, in other words, was not dependent in any way upon the nature and extent of his cooperation with the Staff. In the same way that the Commission independently solicited Kearney's cooperation, it should also independently weigh the value of that cooperation to it in deciding whether to continue to insist upon Kearney's paying such harsh financial penalties.

It would be incredibly shortsighted for the Division of Enforcement to solicit cooperation from a relatively minor participant like Kearney and thereafter refuse to weigh that cooperation in connection with settlement of the case against him. Such a practice, if applied in all Commission cases, would ultimately have a devastating impact on the Commission's future ability to obtain cooperation from anyone. Moreover, in joint investigations like this one with the U.S. Attorney's Office, that practice could have a counterproductive impact on the Government's quest to arrive at the truth.

When someone involved in criminal wrongdoing agrees to cooperate with the U.S. Attorney's Office,

that Office necessarily demands that the cooperating individual be as frank and as open as possible regarding his own participation in the criminality under investigation. Anything short of complete candor would be potentially disastrous to the Government's construction of a successful criminal prosecution. Usually, through the vehicle of a preliminary proffer or some other similar device, the cooperating witness knows in advance what penalty he can expect in the criminal case. Thus, the witness's participation in U.S Attorney debriefing sessions creates no disincentive to truthful testimony. The Staff's policy in this case, on the other hand, would provide a strong motive for a would-be cooperating witness to do what Kevin Kearney absolutely did not do here: to hold back the full truth from Government investigators and thereby attempt to place himself in a better, less incriminatory light in the hope of avoiding ruinous SEC sanctions thereafter.

The Staff's notion that no benefit should be given to Kevin Kearney for his cooperation with the SEC is, simply put, bad public policy. Kearney's cooperation with the Commission should prompt it to offer him a resolution that will not wreak financial devastation upon him and his family. There is no reason in law or public policy for the Division of Enforcement to persist in a demand that Kearney pay ruinous civil penalties.

Kearney is prepared to pay disgorgement at the level sought by the Staff. He is additionally prepared to pay prejudgment interest on his disgorgement remittance. However, in light of all of the circumstances of this case, the additional civil penalties that the Staff would impose upon him are unnecessary, unfair, and unwise.

Very truly yours,

/s/ Robert J. Fetttweis
ROBERT J. FETTWEIS

RJF:ik
cc: David Frolich, Esq.

ADDENDUM 7

Transcript of Proceedings, Trial 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 3:02CR264(AWT)
Hartford, Connecticut
December 6, 2005

UNITED STATES OF AMERICA

vs.

WALTER A. FORBES,
Defendant.

JURY TRIAL
VOLUME XXI

BEFORE: HON. ALVIN W. THOMPSON, U.S.D.J., and a Jury of 12

FOR THE GOVERNMENT:

U.S. DEPARTMENT OF JUSTICE
970 Broad Street, Suite 700
Newark, New Jersey 07101
BY: MICHAEL MARTINEZ, SPECIAL ATTORNEY
CRAIG CARPENITO, SPECIAL ATTORNEY

FOR THE DEFENDANT WALTER FORBES:
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005-5901

BY: BRENDAN V. SULLIVAN, JR., ESQ.
BARRY S. SIMON, ESQ.
ROBERT M. CARY, ESQ.
MARGARET A. KEELEY, ESQ.
MARCIE R. ZIEGLER, ESQ.

* * *

[3676] [THE COURT:] As to Mr. Kevin Kearney, I looked at the transcript pages that were cited in the objections that were filed and those transcript pages were 1194 and 1198, and I don't believe that they really go to the point that was objected to in terms of what is Mr. Kevin Kearney's motivation compared to that of an ordinary witness.

I think this is one where there should have been an objection made and I would have sustained the objection, because the statement—well, actually it's—it was really a question: Does he have a motive beyond that of an ordinary witness? The answer is: Yes. The government didn't make it as a statement. The government made it as a question, as I recall. Actually, I'm reading the defense motion at Paragraph Number 3.

But I think if an objection had been made, I [3677] would have sustained the objection based on the fact that I am going to give an instruction about the way the jury should evaluate the testimony of witnesses who have been given immunity.

But given the fact that I'm going to give that instruction to the jury, I think that will be sufficient, especially since an objection should have been made.

* * *

[3678] [THE COURT:] So for that reason I didn't think it was covered by the objection. It's one I would

have preferred to have dealt with at the time, but I think the fairest thing to do, the way things were handled, is to cover it in the charge and the jury will have the charge in the jury room with it. And this particular charge or paragraph in the charge only talks about Kevin Kearney and it lists, I'm pretty sure—let me check.

Just so we're clear, it's informal immunity of government witness and it's only about Kevin Kearney.

And I think that will be more than sufficient to address the issue in a fair way to proceed.

* * *

ADDENDUM 8

Transcript of Proceedings, Trial 3

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NO: 3:02CR0264(AHN)
September 20, 2006
9:43 A.M.
Bridgeport, CT

UNITED STATES OF AMERICA,
Plaintiff.

vs.

WALTER FORBES, ET AL
Defendants.

HEARING ON MOTIONS

BEFORE: THE HONORABLE ALAN H. NEVAS, U.S.D.J.

APPEARANCES:

FOR THE PLAINTIFF:	NORMAN J. GROSS MICHAEL MARTINEZ CRAIG CARPENITO U.S. Attorney's Office 401 Market Street Camden, NJ 08101
FOR THE DEFENDANT WALTER FORBES	BARRY S. SIMON ROBERT M. CARY TOBIN ROMERO Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, D.C. 2005

* * *

[3] [THE COURT:] Why don't we take up, Mr. Simon, the areas that you think are very, very substantive. Where you have major differences with the government and then kind of maybe work our way back from there.

* * *

[4] MR. SIMON: Well as I said, we go through the fact, starting with Mr. Kearney's Wells submission, in which his own lawyer talks about an agreement with the government and says well it didn't cover cooperation with the SEC. He's talking about there being an agreement. The government, we had a first trial in which the lawyers who first dealt with Mr. Kearney and his lawyers agreed to the instruction. They specifically made it a joint instruction. There was a time when—in second trial, for example, where an instruction was not included—where a witness didn't testify and the government said okay, his name should come out, but that instruction should again be given. There's a long history of representations by the government that there was such an agreement.

And I think the government's relying on the fact [5] that in the second trial they asked Mr. Kearney, is there a written agreement? To which he said no. That's not the issue. The issue is the existence of an agreement. It could be oral as well as written. There's a Second Circuit case, the Refevra (ph.) [*LeFevre*] case which actually reversed the conviction where the government had an agreement with the witness and then tried to persuade the jury that it didn't exist. And the Court went through the whole—the wall—well the whole due process analysis of not just an issue of putting on false testimony, but not correcting

false testimony that is put into the record by the witness, including evidence that goes to credibility. And so if you take a look at I think it's at page two of our supplemental opposition, we lay out the entire history, attribute this to inadvertence, your Honor, I think is just—there's a long, long history of repeated representations. Which I think the government is bound.

MR. GROSS: Judge, I'm embarrassed to admit that this is was a matter of inadvertence.

THE COURT: Inadvertence in what respect?

MR. GROSS: In not objecting earlier in the first two trials to an instruction that Mr. Kearney testified pursuant to some sort of immunity. Simply put, he has never been given—your Honor, there is Craig [6] Carpenito, a member of the trial team. I know he hasn't appeared before you. He's a little bit late because he's getting here for the first time.

THE COURT: So the instruction was given—

MR. GROSS: Erroneously in the defendant's favor in the first two trials, and he's not entitled to the benefit of the same error in the third trial. The reason he is not entitled is because there is no immunity agreement with respect to Mr. Kearney, either oral or written. I don't think there's any dispute that there's no written immunity agreement.

The testimony that the defense points to to establish that there was an oral agreement appears on page 9881 and 9882 from the first trial. And on cross-examination Mr. Kearney's asked by defense counsel: When were you told that you wouldn't be prosecuted? Answer: I was told I was not a target of the investigation pretty early on. Now, your Honor,

there's a difference being told you're not a target of the prosecution early on in the investigation and being promised that you're not going to be prosecuted.

And we'll establish this conclusively at the third trial. Mr. Kearney will testify that he was never promised by any member of the prosecution team at any time that he would not be prosecuted. Even to this day. [7] Whether or not Mr. Kearney, you know, believes—

THE COURT: Who is Mr. Kearney's lawyer?

MR. GROSS: His lawyer is Bob Fettweiss. And we've spoken with Mr. Fettweiss recently and Mr. Fettweiss has confirmed that he never had any kind of an immunity agreement with the government on behalf of Mr. Kearney. In fact, it was his purposes not to get a proffer agreement—I'm sorry, an immunity agreement in this case.

So there's simply no basis for the instruction. And, you know, I look pretty foolish sitting here—and I haven't gone through two trials based on my assumption that there was an immunity agreement on behalf of Mr. Kearney; but when we got down and really looked hard at it, it turned out that there is not.

* * *

[8] MR. SIMON: Our position is that there was a cooperation agreement and that he received the benefit when the government agreed not to prosecute him. And that is consideration the government already gave him and he has an ongoing motive to cooperate as a result of that. And that provides the motive—

* * *

[14] MR. SIMON: Your Honor, the lawyers who dealt with Mr. Kearney and his counsel are not the lawyers that are sitting in the room; and they all agreed to the charge the first time. And there's an evidentiary basis for it and there are cases that—

THE COURT: What do you mean the lawyers—oh, you mean the prosecutors?

MR. SIMON: The prosecutors. The prosecutors. This is not just one set of prosecutors' inadvertence. There's multiple sets of prosecutors. They sat through [15] an entire trial. They knew what the evidence was, presumably. They knew what the instructions were. They heard the instruction given after having dealt directly with Mr. Kearney and his counsel. There's also law that just because a defense lawyer, for example, protects his client, doesn't, you know, expressly tell the client what the agreement is, doesn't change the fact that there is an agreement. And it's improper to withhold that from the jury. We've cited those cases in the various motions. We can get the specific cites if the Court wants. But this is something that the government has agreed to repeatedly. Two different sets of prosecutors, including the prosecutors who were there on the scene dealing with Mr. Fettweiss and with Mr. Kearney. And let me also say, your Honor, the context of this. This is the witness that we had an argument about last week who for five years says nothing about meetings with Mr. Bell, says nothing about any references to Walter Forbes and then five years later makes those statements and the government wants to present him as a disinterested witness with nothing to gain and present that to the jury. And frankly, in our perspective, that only compounds all

the Wallik [*sic—Wallach*] and due process issues with that testimony.

* * *

[19] MR. SIMON: . . . If he denied that he was given a promise, I believe we would be entitled to read this instruction that they were—that was given, that that was the government's position in two prior trials. That in fact he did have a promise that he wouldn't be [20] prosecuted. Because that's a government admission. I don't know whether the government wants to go down that road, but that's our position. We would be entitled to put that in as an admission by the government. If they want to put on a parade of agents and say oh, no, we didn't really promise him, we really didn't have that mutual understanding. That would be their burden. But we don't have to go down that road—

* * *

[24] THE COURT: Okay. Well I think my—As I said earlier, I think my instincts tell me the best thing to do here is to wait on this. I don't want to be unfair to either side and say now what I'm going to do. Because if I said I won't give the charge because the government's representing to me that no promises were made and then it turns out during the course of Mr. Kearney's testimony, whether it be on direct or whether it be on cross that he then says oh, yeah, my understanding was I had a promise. Then clearly the instruction is appropriate.

MR. SIMON: Your Honor, say he says I wasn't given a promise.

THE COURT: Was not?

MR. SIMON: Say he said I wasn't. It doesn't resolve the issue.

THE COURT: Well then the issue is a question of estoppel.

MR. SIMON: Or a government admission that can be offered into evidence to impeach him. That's the way it comes up. This is a formal pleading in which they [25] made the representation that that's what happened. Not once, but twice.

* * *